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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1982

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OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,

*Petitioners,*

v.

SEALY, INCORPORATED, et al.,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Is Sealy's horizontal allocation of exclusive manufacturing territories unlawful *per se* under Section 1 of the Sherman Act?

(Discussed *infra*, pp. 4–6)

2. Does the second clause of the Seventh Amendment require that a district court exercise its power under Rule 54(b) of the Federal Rules of Civil Procedure to correct on remand a remittitur which has been held erroneous on appeal?

(Discussed *infra*, pp. 6–7)

3. Does Rule 54(c) of the Federal Rules of Civil Procedure require that money damages be awarded in this case with respect to any injuries suffered during the period which elapsed between the 1975 jury verdict for plaintiffs and the 1981 award of injunctive relief?

(Discussed *infra*, pp. 7–8)

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No.

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1982

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,

*Petitioners,*

v.

SEALY, INCORPORATED, et al.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Ohio-Sealy Mattress Manufacturing Company and its subsidiaries[1] pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 669 F.2d 490, and is set forth commencing at page A1 of the Appendix hereto. The order of the Court of Appeals requiring respondents to answer Part I of petitioners' Petition for

[1]Petitioners' statements pursuant to Supreme Court Rules 21.1(b) and 28.1 are set forth in the Appendix hereto at page A232.

Rehearing and Suggestion of Rehearing In Banc (the substantive antitrust issue) is set forth at page A13. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion of Rehearing In Banc is set forth at page A14.

Petitioners have also appended to their petition certain orders and opinions, and the record of certain proceedings, in this case and related cases. This Court's opinion in *United States* v. *Sealy, Inc.*, is reported at 388 U.S. 350. The Court of Appeals' opinion on the first appeal of this case is reported at 585 F.2d 821. The decisions of the district court for the Northern District of Illinois in the related cases are reported at 346 F. Supp. 353, 90 F.R.D. 11 and 486 F. Supp. 1047. None of the other opinions or orders set forth in the Appendix has been reported.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 29, 1982. A petition for rehearing and suggestion for rehearing in banc was denied on June 3, 1982, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ."

The Seventh Amendment to the Constitution of the United States of America provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 54(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "(c) *Demand for Judgment* . . . Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . . ."

## STATEMENT OF THE CASE

In 1967, twenty-nine days after this Court's decision in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) (Appendix, A157) the licensee-directors of Sealy, Inc. ("Sealy") met to discuss--in the words of Sealy's Corporate Secretary—"ways and means to get around the Supreme Court ruling in such a way as to be able to retain the territorialization." Thereafter Sealy developed more subtle means of allocating markets and took steps to coerce reluctant licensees to accept those means. See *Sealy Mattress Company of Southern California* v. *Sealy, Inc.*, 346 F. Supp. 353, 357 (N.D. Ill. 1972) (Appendix, A170, A175).

In 1971 petitioners ("Ohio") filed this private antitrust action. Although the primary relief sought by Ohio was injunctive relief, Sealy demanded a jury and filed a counterclaim which required that Ohio's suit be tried by jury. In 1975, after a four-month trial, the jury returned verdicts in favor of Ohio on both the complaint and the counterclaim. In 1976 the district court denied Sealy's motion for a new trial on the condition that Ohio remit half of the $20.4 million judgment (Appendix, A15). In 1977 the district court refused to grant Ohio any equitable relief whatsoever (Appendix, A32). Ohio then appealed the denial of equitable relief and Sealy cross-appealed from the underlying jury verdict.

In 1978 the Court of Appeals for the Seventh Circuit upheld the jury verdict and reversed the denial of equitable relief. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978) (Appendix, A51). In the course of its opinion, the Court of

Appeals held that the jury verdict had been "unnecessarily halved" (585 F.2d at 843; Appendix, A93). This Court denied Sealy's petition for certiorari (440 U.S. 930).

In 1979, on remand, the district court refused to restore the "unnecessarily halved" jury verdict and refused to hold a hearing regarding the damages incurred by Ohio-Sealy after the 1975 jury verdict (Appendix, A100). In 1981 the district court entered a final judgment which enjoined several of Sealy's restraints but which did not enjoin Sealy's system of exclusive manufacturing territories (Appendix, A124, A156). Ohio appealed and Sealy filed a contingent cross-appeal which again challenged the underlying jury verdict.

In late January, 1982, the Court of Appeals for the Seventh Circuit affirmed the district court's rulings in all respects and dismissed Sealy's contingent cross-appeal. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir. 1982) (Appendix, A1). In February Ohio petitioned for rehearing and Sealy was ordered to answer Ohio's first point—exclusive manufacturing territories (Appendix, A13). Sealy answered in early March and Ohio's petition was denied on June 3, 1982 (Appendix, A14).

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Presents An Antitrust Question Of Unusual Importance Which Has Never Been Addressed By This Court—The *Per Se* Unlawfulness Of Horizontal Allocations Of Exclusive Manufacturing Territories.

The antitrust issue presented is one of unusual importance because the decision below adds a new dimension to antitrust analysis under Section 1 of the Sherman Act: certain horizontal non-price restrictions—such as allocation of sales markets—are subject to the *per se* rule, but others are not. No prior decision of this Court supports such distinctions among horizontal non-price restraints.

As interpreted by Sealy, the Sealy license agreement prohibits any Sealy licensee from manufacturing Sealy products outside an assigned "Area of Primary Responsibility." Ohio attacked this restriction as *per se* unlawful, but the Court of Appeals held that the district court was required to enjoin its enforcement "*only* if necessary to prevent future allocation of sales markets" (669 F.2d at 496; Appendix, A12; emphasis supplied). Indeed, the Court of Appeals went on to say that it was sufficient that the district court's decree "opened the market to permit at least 'significant intrabrand competition among neighboring licensees,'" even though it acknowledged that "permitting Sealy to enforce the exclusive manufacturing clause may prevent Ohio from competing effectively in every APR" (*id.*).[2] The Court of Appeals thus concluded that a horizontal allocation of sales markets is *per se* unlawful under the Sherman Act, but that other horizontal restraints—including at least the restraint presented here—are not *per se* unlawful.

In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), however, this Court indicated that no such distinctions should be drawn. In *Sylvania*, this Court concluded that vertical non-price restrictions should be scrutinized under the rule of reason, but that vertical price restraints, together with horizontal price and non-price restraints, would remain subject to the rule of *per se* illegality. Indeed, this Court expressly warned against confusing vertical non-price restrictions with restrictions originating in agreements among competitors competing at the same level of the market structure, stating, "[t]here is no doubt that restrictions in the latter category would be illegal *per se*" (433 U.S. at 58 n.28).[3]

[2]In fact, as Sealy graphically admitted in a map it provided to the Court of Appeals (See A231), Sealy's exclusive manufacturing territories preclude Ohio from competing with Sealy itself or other Sealy licensees in approximately *half of the United States*. See also *Ohio-Sealy Mattress Mfg. Co.* v. *Duncan*, 486 F. Supp. 1047, 1060 n.36 (N.D. Ill. 1980) (Appendix A183, A204 n.36).

[3]This Court cited the following decisions in support of its statement: *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).

More recently, in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), this Court's *per curiam* decision specifically reaffirmed that horizontal price restraints are *per se* unlawful even if the specific practice in question may be absolutely "harmless in a particular set of circumstances" (*id.* at 649).

And in *Arizona* v. *Maricopa County Medical Society*, 102 S. Ct. 2466 (1982), this Court devoted virtually its entire opinion to reasserting its "adherence" to the *per se* rule (102 S. Ct. at 2478).[4] In *Maricopa*, as in *Sylvania*, this Court specifically relied upon *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), a decision "applying the *per se* rule to invalidate the restrictive practice" even though this Court might have reached a contrary result under the rule of reason (102 S. Ct. at 2473 n.16).[5]

The Court of Appeals' departure from the established taxonomy of *per se* rules should be reviewed by this Court.

### 2. The Decision Below Presents A Question Under The Seventh Amendment Which Has Not Been, But Should Be, Decided By This Court.

In *Dimick* v. *Schiedt*, 293 U.S. 474 (1935), this Court pointed out that remittitur orders are of questionable fairness and doubtful constitutionality under the Seventh Amendment, but the practice was permitted on the ground that a remittitur merely excises an "excrescence" from the jury's verdict. In the instant case the remitted $10.2 million was not an "excrescence" and the district court's remittitur order deprived Ohio of its rights under the Seventh Amendment. The only question is whether there is an

[4] "Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States* v. *Topco Associates, Inc.*, *supra*, at 611–612."

[5] *Topco* was squarely premised on this Court's decision in *United States* v. *Sealy, Inc.* See 405 U.S. at 609.

insuperable procedural obstacle which prevents a court of review from correcting the district court's unconstitutional action.

The Court of Appeals purported to find such an obstacle in *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648 (1977).[6] *Donovan* merely held that a plaintiff who has accepted a remittitur "may not appeal" (429 U.S. at 650),[7] but the Court of Appeals interpreted *Donovan* as creating an "estoppel rule" which applies to remands as well as to appeals. This "estoppel rule" was then applied to deny Ohio's appeal from the district court's refusal to exercise its powers under Rule 54(b) and correct on remand a remittitur that had already been found erroneous on the prior appeal (669 F.2d at 493; Appendix, A6).

*Donovan* did not alter the constitutional principle stated in *Dimick*, nor did it create a new procedural barrier to the protection of Seventh Amendment rights. The Court of Appeals' extension of *Donovan* in such a way as to obviate *Dimick* and thus deprive Ohio of its rights under the second clause of the Seventh Amendment should be reviewed.

### 3. The Court Of Appeals Has Sanctioned A Departure From The Obligation Of A Federal District Court To Provide Complete Relief Under Rule 54(c) Of The Federal Rules Of Civil Procedure.

Rule 54(c) of the Federal Rules of Civil Procedure provides that "every final judgment *shall* grant the relief to which the party in whose favor it is rendered is entitled . . ." (Rule 54(c), Fed. R.

[6]The Court of Appeals also suggested that the mandate in its prior decision precluded the district court from reinstating the jury's verdict. *But cf. Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970). This Court is not bound by the Court of Appeals' later interpretation of its own mandate. *See Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965).

[7]The purpose of the rule announced in *Donovan* was to promote "the interest in judicial administration" by "treating orders of remittitur as interlocutory and therefore unappealable," because otherwise, "a plaintiff would have nothing to lose by accepting a remittitur . . . and then proceeding to the court of appeals" (*Donovan* v. *Penn Shipping Co., Inc.*, 536 F.2d 536, 537 (2d Cir. 1976), *aff'd*, 429 U.S. 648 (1977) ).

Civ. P.; emphasis supplied). The Court of Appeals held, however, "that to the extent Ohio has any valid causes of action against Sealy for . . . [supplemental] damages, Ohio is *required* to seek their recovery in another lawsuit" (669 F.2d at 494; Appendix, A8; emphasis supplied). The Court of Appeals' holding is impossible to reconcile with Rule 54(c) or with the historic obligation of the federal courts prior to the merger of law and equity. See *Greene* v. *Louisville & Interurban Railroad Company*, 244 U.S. 499, 520 (1917); *Gulbenkian* v. *Gulbenkian*, 147 F.2d 173, 176 (2d Cir. 1945). See also *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959).

The Court of Appeals cited no authority for its holding and the authorities which do exist—including a decision in the same Circuit—are to the contrary. In *Sundstrand Corp.* v. *Standard Kollsman Industries, Inc.*, 488 F.2d 807 (7th Cir. 1973), the Court of Appeals held that the district court, after having denied equitable relief, should have gone on and conducted a hearing on damages, because:

> "If the case is dismissed with prejudice, a subsequent suit for damages would be barred by res judicata. This certainly fails to comport with Rule 54(c) . . ." (*id.* at 815).

In this case, the Court of Appeals did the opposite: it required Ohio to seek a damage remedy in other lawsuits and it compounded this error by suggesting in *dicta* that at least some of the relief sought by Ohio would be barred by *res judicata* (669 F.2d at 494–95; Appendix, A5 to A8).

Rule 54(c) *mandates* complete relief in a single action, but the Court of Appeals expressly "held" that Ohio is "required" to seek relief in a separate action where at least part of Ohio's supplemental damages may be barred by the doctrine of *res judicata*. See *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11, 14–19 (N.D. Ill. 1980) (Appendix, A212, A216 to A226). Such a clear departure from the express words of Rule 54(c)—and such an obviously unjust result—casts a shadow on the Federal Rules, a shadow which this Court should remove.

## CONCLUSION

After more than eleven years of litigation in which it proved a hard core antitrust violation, Ohio has not been made whole and has not been freed of a serious and unlawful restriction on its ability to compete. This Court should grant Ohio's petition and decide each of the questions presented.

Respectfully submitted,

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OHIO-SEALY MATTRESS MANUFACTURING COMPANY, Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico. Inc., and Sealy Mattress Company of Georgia, Inc., Plaintiffs-Appellants, Cross-Appellees,

v.

SEALY, INCORPORATED, Sealy Spring Corporation-Indiana, Sealy Spring Corporation-East, Sealy Spring Corporation-West, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Schnorr Manufacturing Company, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc., Defendants-Appellees, Cross-Appellants.

Nos. 81-1542, 81-1615.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 30, 1981.

Decided Jan. 29, 1982.

Before SPRECHER and BAUER, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

BAUER, Circuit Judge.

This is the second appeal in this antitrust suit. Ohio Sealy Mattress Manufacturing Company ("Ohio") filed suit against Sealy, Incorporated ("Sealy") in 1971 alleging that Sealy was engaged in a scheme to allocate markets in violation of Section 1 of

the Sherman Act, 15 U.S.C. § 1. Ohio sought legal and equitable relief. After a four month trial, the jury returned a $6,814,852 verdict for Ohio. Sealy filed post-trial motions for judgment notwithstanding the verdict and for a new trial. The district court denied both motions, conditioning the denial of Sealy's motion for a new trial on Ohio's acceptance of a fifty percent remittitur. Ohio accepted the remittitur. The court then conducted hearings on Ohio's request for equitable relief and entered final judgment denying all equitable relief and awarding Ohio trebled, remitted damages of $10,222,278.

Both Ohio and Sealy appealed from the judgment of the district court. We affirmed the remitted jury award and reversed the court's denial of equitable relief. We remanded with instructions to the district court to reconsider whether equitable relief should be awarded. *Ohio Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 844–45 (7th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979).

On remand, Ohio moved the district court to reinstate the remitted portion of the judgment. Ohio also requested that the court award it supplemental damages. The district court denied both motions. After conducting an evidentiary hearing at which Sealy and Ohio introduced expert testimony concerning whether equitable relief was warranted and, if so, what type of relief would be appropriate, the district court enjoined Sealy from continuing most of the conduct which Ohio claimed were components of Sealy's unlawful market allocation scheme.

Ohio appeals and Sealy has filed a contingent cross-appeal. We affirm the judgment of the district court and dismiss Sealy's cross-appeal.

Defendant Sealy owns trademarks for the "Sealy" brand of bedding products which it licenses independent manufacturers to

use. The license agreement assigns each licensee a geographic area of primary responsibility ("APR"). The agreement provides that no other licensee will be permitted to manufacture Sealy products in a licensee's APR. Additionally, the licensee is authorized to manufacture Sealy products only at the location(s) specified in the license agreement and at any additional locations that Sealy might later approve in writing. The licensee is responsible for promoting Sealy sales in its APR, but it is also permitted to sell Sealy products in other licensees' territories. If a licensee sells Sealy products outside its APR, it must pay two types of out-of-APR charges. First, it is required to pay passover payment charges to cover its share of promotional expenses in the APR. This payment is designed to prevent free-rider problems. The licensee is further required to pay a warranty repair service charge designed to cover the cost of repairs the invaded licensee might have to make on the other licensee's Sealy products. The license agreement includes a clause granting Sealy the right of first refusal should a licensee wish to sell its business. The agreement also forbids the licensee from acquiring any interest in a competitive organization.

Ohio claims that Sealy used the aforementioned license provisions to achieve a division of markets. Ohio concedes that these license provisions may be lawful in and of themselves, but argues that they are unlawful if used as part of a scheme to allocate markets. Ohio claims that Sealy unlawfully exercised its right of first refusal in 1972 to prevent Ohio from acquiring the Florida, Philadelphia, and Pittsburgh licensees as part of the illegal market allocation scheme. Ohio contends that the neighboring licensees feared that if Ohio obtained the three licensees it would engage in vigorous intrabrand competition that the neighboring licensees sought to avoid.

The jury was instructed that it could find for Ohio only if it found that Sealy was engaged in an unlawful scheme to allocate

markets. The jury did so find and awarded Ohio more than $6 million damages. Although the jury returned a general verdict, the amount of the verdict "makes it a mathematical certainty that the jury found at least one of Sealy's first-refusal acquisitions . . . to have violated the antitrust laws." 585 F.2d at 844.

In the first appeal, Sealy claimed that the district court erred in denying its motion for judgment notwithstanding the verdict because Ohio had failed to introduce sufficient evidence from which a reasonable jury could have found an antitrust violation. After carefully reviewing the record, we concluded that there was sufficient evidence to support the jury finding that Sealy had used the challenged license provisions to achieve an unlawful division of markets. We held that the district court did not err in denying Sealy's motion.[1]

Sealy also claimed that the court erred in denying its motion for a new trial on the condition that Ohio accept a fifty percent remittitur. The district court held that remittitur was necessary to cure the effects of Ohio's counsels' prejudicial misconduct which led the jury to award excessive damages. Sealy claimed on appeal that the court should have granted a new trial because counsels' misconduct may also have led the jury to err in finding an antitrust violation at all. Sealy argued that the effect of any prejudice could not be said to have been confined solely to the damage award.

In deciding Sealy's claim, we noted that although Ohio was foreclosed "from seeking reinstatement of the 50% remitted now that Sealy attacks the remittitur on appeal," Ohio could argue in

[1]We further held, however, that the district court should have directed a verdict in Sealy's favor concerning Ohio's claim that Sealy's national accounts program and collection of royalties for sale of non-Sealy products were unlawful. 585 F.2d at 839. Ohio claimed damages of $400,000 resulting from these two programs. We found that the court's error in failing to direct a verdict on these issues was harmless in view of the court's remittitur of the damage award by $3 million. *Id.* at 836–39.

defense of its judgment that the district court erred in remitting the verdict. *Id.* at 840. After reviewing the record, we concluded that there had been no prejudicial misconduct. *Id.* at 843. Therefore, Sealy was not entitled to a new trial. We held that the court did not err in denying Sealy's motion for a new trial, and we affirmed the remitted jury award.

We reversed the judgment, however, to the extent that the district court had refused to award Oho equitable relief. In denying equitable relief, the district court had assumed that the jury had found only that at least one of Sealy's right of first refusal acquisitions was unlawful. Given that the jury was instructed that it could find Sealy's use of the right of first refusal unlawful only if it found that the right was used as part of an unlawful scheme to allocate markets, the jury must also have found that Sealy was engaged in an unlawful market allocation scheme. *Id.* at 844. We remanded with instructions to the district court to reconsider "what total mix of equitable relief, if any, might be just in the circumstances," given that Sealy had been found to have engaged in an unlawful scheme to allocate markets. *Id.* at 845 n.34.

II

Ohio appeals the district court's denial of its motion for reinstatement of the remitted portion of the judgment. Ohio claims that the district court was bound on remand to enforce our mandate and opinion, in which we held that there had been no prejudicial misconduct necessitating a new trial or remittitur. Ohio contends that the district court should have corrected its erroneous ruling by restoring the remitted portion of the judgment. We disagree.

Indeed, on remand the district court was required to follow the mandate of this court. *Banker's Life & Casualty Co. v. Bellanca Corp.*, 308 F.2d 757, 759 (7th Cir. 1962). Our opinion set forth the law of the case to be enforced by the district court. *Hayes v. Thompson*, 637 F.2d 483, 487 (7th Cir. 1980). *Accord, SEC v.*

*Advance Growth Capital Corp.*, 539 F.2d 649, 650–51 (7th Cir. 1976). We held that Ohio was foreclosed "from seeking reinstatement of the 50% remitted." 585 F.2d at 840. We further held that the final judgment, insofar as it awarded Ohio $10,222,278 the remitted amount, was affirmed. We instructed the district court to award post-judgment interest and to reconsider whether equitable relief should be awarded. *Id.* at 847. Thus, our mandate instructed the district court to enforce satisfaction of the remitted judgment. The court was not empowered to reinstate the jury verdict.

Moreover, even if our mandate had not specifically precluded reinstatement of the remitted portion of the judgment, Ohio is estopped from seeking restoration of the full jury award. A plaintiff who accepts a remittitur rather than risk a new trial may not later challenge the validity of the remittitur order. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977) (per curiam). This estoppel rule applies even where the district court's grant of a new trial would have been reversed if the plaintiff had refused to accept the remittitur and had appealed the order granting the defendant a new trial. *Lewis v. Wilson*, 151 U.S. 551, 555, 14 S.Ct. 419, 420, 38 L.Ed. 267 (1894).

The district court did not err in denying Ohio's motion for reinstatement of the remitted portion of the judgment.

## III

On remand, Ohio filed a motion requesting the district court to award it supplemental damages. Ohio claims that some of the damages it seeks were caused by Sealy's *pre-verdict* antitrust conduct. The rest of the damages were allegedly caused by unlawful *post-verdict* conduct. The district court denied the motion on the ground that Ohio had two pending lawsuits against Sealy in

which it is seeking to recover these damages.[2] Ohio claims that the district court erred in denying its motion and erred in failing to hold an evidentiary hearing.

The short answer to Ohio's claim is that to the extent that its causes of action against Sealy are not barred by *res judicata*, Ohio may file new suits to recover the alleged damages. We agree with the district court, however, that Ohio is not entitled to recover the damages in this lawsuit.

In the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328, 75 S.Ct. 865, 868, 99 L.Ed. 1122, *reh. denied*, 401 U.S. 1015, 91 S.Ct. 1250, 28 L.Ed.2d 552 (1955). At the time of accrual, the plaintiff is entitled to recover all damages caused by the antitrust conduct, including damages that will be suffered during and after trial. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. at 339, 91 S.Ct. at 806. If, however, future damages that might be suffered after trial are speculative or their nature and amount unprovable at the time of trial, the cause of action for these damages has not yet accrued, and the plaintiff may thereafter sue the defendant to recover these future damages when they accrue. *Id.* On the other hand, if the future damages are not speculative at the time of trial, the plaintiff's cause of action concerning those damages has accrued and he must seek to recover them at trial. *Res judicata* bars the plaintiff from splitting his cause of action; once he sues, he must seek all the damages that have then accrued as a result of the defendant's antitrust conduct. *Id.*

[2]Ohio has two suits pending against the Sealy directors in the Northern District of Illinois: *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 40, and *Ohio-Sealy Mattress Mfg. Co. v. Duncan*, No. 79 C 2741.

If the defendant continues the same scheme to violate the antitrust laws after trial, a new cause of action accrues to the plaintiff for any damages caused by the defendant's post-verdict antitrust conduct. *Lawlor v. National Screen Service Corp.*, 349 U.S. at 327–28, 75 S.Ct. at 868. In that instance, the plaintiff is entitled to file a new lawsuit to recover these post-verdict damages. *Id.*

Part of the damages Ohio seeks were allegedly caused by Sealy's pre-verdict antitrust conduct. Ohio admits that it made a "litigation choice" when it filed this suit not to seek future damages caused by Sealy's pre-verdict antitrust conduct. If these alleged future damages could have been proven at trial, Ohio is barred by principles of *res judicata* from attempting to recover them in this or any other lawsuit. If, however, these alleged damages were not provable at trial, Ohio has an independent cause of action which it may now pursue in another, separate lawsuit. For those damages that Ohio seeks which were caused by antitrust conduct occurring after the verdict in this case, Ohio has an independent cause of action that it may pursue in another lawsuit. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

We need not decide which, if any, of the supplemental damages Ohio now seeks are barred by *res judicata*. We hold only that to the extent Ohio has any valid causes of action against Sealy for these damages, Ohio is required to seek their recovery in another lawsuit. The district court did not err in denying Ohio's motion for supplemental damages. The court also did not err in failing to conduct an evidentiary hearing on this issue since Ohio was not entitled to supplemental damages in this suit as a matter of law.

## IV

We remanded this case to the district court with instructions to decide "what total mix of equitable relief, if any" should be awarded. 585 F.2d at 845 n.34. After conducting an additional

equity hearing, the district court entered a decree enjoining Sealy from: (1) collecting passover payments and warranty repair charges for out-of-APR sales; (2) enforcing the plant-location clause; (3) enforcing the no-competitive-interests clause; (4) using the right of first refusal clause for an anticompetitive purpose; (5) placing any additional restrictions on approval of license transfers; and (6) tying mattress components to the Sealy trademarks. Ohio appeals from this decree, claiming that the court erred in failing to order divestiture of the Florida, Philadelphia, and Pittsburgh licensees to Ohio and in failing to enjoin Sealy from enforcing the exclusive manufacturing territory clause.

An equitable decree in a private antitrust suit should award the plaintiff injunctive relief only to the extent necessary to protect it from future damage likely to occur if the defendant continues the unlawful antitrust conduct. 15 U.S.C. § 26.[3] "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *United States v. DuPont & Co.*, 366 U.S. 316, 326, 81 S.Ct. 1243, 1250, 6 L.Ed.2d 318 (1961). The decree should be designed to ensure that the defendant will not continue the specific illegal practice. *International Salt Co., Inc. v. United States*, 332 U.S. 392, 401, 68 S.Ct. 12, 17, 90 L.Ed. 20 (1947). The "specific illegal practice" found in this case was a scheme to allocate markets. Thus, the decree in this case should be designed to restore competition by preventing Sealy from continuing to divide its bedding sales markets. After careful review of the record we are convinced that the district court's decree will effectively restore competition and protect Ohio from any further "threatened loss or damage" caused by Sealy's market allocation scheme.

First, Ohio claims that the court erred in failing to order divestiture of the Florida, Philadelphia, and Pittsburgh licensees which

[3] 15 U.S.C. § 26 makes injunctive relief available to a private antitrust plaintiff to prevent "threatened loss or damage by a violation of the antitrust laws."

Sealy acquired by exercising its right of first refusal when Ohio sought to purchase these licensees.[4] Ohio's plea for divestiture presents an issue of first impression in this circuit. To the best of our knowledge, only two district courts in the Ninth Circuit have ordered divestiture as part of the equitable relief in a private antitrust suit. In both instances, the award was reversed on appeal. *See Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976); *ITT Corp. v. GTE Corp.*, 518 F.2d 913, 920 (9th Cir. 1975), *on remand*, 449 F. Supp. 1158 (D.Hawaii 1978). We note that the Ninth Circuit, after carefully reviewing the legislative history of section 16 of the Clayton Act,[5] held that Congress did not intend to include divestiture as part of the injunctive relief available in a private suit. *ITT Corp. v. GTE Corp.*, 518 F.2d at 921–24. We need not decide today, however, whether divestiture is ever available in a private antitrust suit. We hold

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[4] On remand Ohio sought leave to introduce a document purported to be an itemization of the jury's verdict in support of its contention that Ohio is entitled to divestiture of the Florida and Philadelphia licensees. Ohio claims that the court erred in denying its motion.

It is axiomatic that a jury's deliberations are confidential and the court must not permit either party to challenge the validity of a verdict by examining individual jurors "as to any matter or statement occurring during the course of the jury's deliberations." Rule 606, Fed.R.Evid. Ohio claims that rule 606 is not dispositive of its motion because it was not challenging the *validity* of the verdict; rather it was seeking clarification concerning precisely what the jury decided. If Ohio wished to know precisely which issues the jury found in its favor, it should have requested a special verdict. Rule 49, Fed.R.Civ.P. In fact, Ohio initially did suggest that the court request a special verdict on which equitable relief could be predicated, but at the close of trial, Ohio's counsel did not submit special verdict forms. "Neither a trial court nor an appellate court has the authority to inquire into the jury's decisional processes, even when information pertaining to the deliberations is volunteered by one of the jurors." *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245, 1247 (3d Cir.), *cert. denied*, 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971). The district court did not err in denying Ohio's motion to admit the document in question.

[5] 15 U.S.C. § 26. *See* note 3 *supra*.

only that the district court did not err in refusing to award divestiture in this case.

After Sealy acquired the Florida, Philadelphia, and Pittsburgh licensees, Ohio acquired the Randolph, Massachusetts and the Atlanta, Georgia licensees. The APRs of these two licensees are near the Philadelphia and Florida APRs respectively. Similarly, Ohio's Medina, Ohio plant is located near the Pittsburgh APR. As it now stands, Sealy and Ohio are able to engage in vigorous intrabrand competition in these markets areas. If we ordered divestiture, Ohio would be the exclusive Sealy manufacturer in these areas and the amount of intrabrand competition would likely decrease.[6] Given that the remedy in this case should *restore* competition, not diminish it, divestiture would be inadvisable. The district court did not err in failing to order divestiture of these three licensees.[7]

Ohio also claims that the district court erred in failing to enjoin Sealy from enforcing its exclusive manufacturing territory clause. The district court was required to enjoin enforcement of this

---

[6]We realize that ordering divestiture of the Florida, Philadelphia, and Pittsburgh licensees to Ohio would not necessarily cause a total lack of intrabrand competition since other Sealy licensees could still make out-of-APR sales in these territories. We believe, however, that divestiture would cause an overall decrease in intrabrand competition in these areas, a result we wish to avoid.

[7]Ohio claims that it is entitled to monetary relief if divestiture is denied. We disagree. Ohio presented its claim for money damages caused by Sealy's acquisition of the three licensees to the jury. In fact, the amount of the jury verdict establishes as a "mathematical certainty" that the jury did indeed award damages for at least one of Sealy's first refusal acquisitions. 585 F.2d at 844. To the extent that any future damages caused by these acquisitions were speculative at trial, Ohio may sue Sealy for their recovery in a separate lawsuit when the damages accrue. To the extent that these damages were provable at trial, Ohio is estopped to seek them now or in a subsequent lawsuit. *See* discussion in subsection III, *supra*.

clause only if necessary to prevent future allocation of sales markets. In our first decision in this case we noted that

> the local nature of the mattress business and the exclusive manufacturing areas used by Sealy really do little more than set the stage for the balance of the restraints attacked. Any licensee could, *e.g.*, engage in significant intrabrand competition at least with his neighboring licensees if Sealy's restraints went no further.

585 F.2d at 828. The district court's decree enjoined Sealy from enforcing all the other challenged license restraints. In so doing, the district court opened the market to permit at least "significant intrabrand competition among neighboring licensees." Of course, permitting Sealy to enforce the exclusive manufacturing clause may prevent Ohio from competing effectively in every APR. Our goal in framing an equitable decree, however, is not to ensure that Ohio attains every competitive advantage it seeks. Rather, we seek only to ensure that our decree will restore intrabrand competition as a whole. We are convinced that the decree in this case will achieve this result.

V

For the reasons stated in this opinion, we affirm the judgment of the district court and dismiss Sealy's contingent cross-appeal.

AFFIRMED.

# United States Court of Appeals

For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

February 18, 1982

Howard R. Koven
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James E. Hastings
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McGee & Hastings
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Appeal Nos. 81-1542 & 81-1615
In Re: OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al., plaintiffs-appellants, cross appellees, vs. SEALY, INC., et al., defendants-appellees, cross appellants.

Dear Sirs:

The Court has directed the Clerk to notify counsel for SEALY, INC., et al., in the above entitled appeals to file an answer to Part I of the petition for rehearing with suggestion for rehearing in banc filed herein by counsel for OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al. Twenty-five copies of that answer will be required; they will be due by March 1, 1982.

TFS/sls
cc: Frederic F. Brace, Jr.
Brace & North
55 E. Monroe
Suite 3425
Chicago, IL 60603

Sincerely yours,

Thomas F. Strubbe,
Clerk

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 3, 1982

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,
Plaintiffs-Appellants, Cross-Appellees,

Nos. 81-1542 & 81-1615 vs.

SEALY, INC., et al.,
Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 1243
James B. Parsons, Judge.

## ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiffs-Appellants, Cross-Appellees Ohio Sealy Mattress Manufacturing Company, et al., no judge in active service has requested a vote thereon, and as of April 21, 1982 all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, denied.

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Honorable Robert A. Sprecher, Circuit Judge, did not participate in the voting on this petition.

# UNITED STATES DISTRICT COURT
# FOR THE NORTHERN DISTRICT OF ILLINOIS
# EASTERN DIVISION

No. 71 C 1243

OHIO-SEALY MATTRESS MFG. CO.,
et al., *Plaintiffs,*
V.
SEALY, INC., et al., *Defendants.*

## RULING ON DEFENDANT'S POST TRIAL MOTIONS
## (MAY 19, 1976)

[PST 372] The Court: * * * This civil action was commenced on May 20th, 1971. Selection of a jury for the trial of both the amended complaint and revised supplemental complaint, as amended, and the third amended counterclaim, as amended, was begun on November 25, 1974.

Verdicts were returned on April 2nd, 1975. Judgment thereon was entered the next day. The jury found for the plaintiffs on the complaint and assessed damages in the amount of approximately $6.8 million dollars, and found for the counter-defendant on the counterclaim.

[PST 373] Presently pending are the defendants' motion for the entry of an order granting them judgment notwithstanding the verdict on the complaint and the defendants' and counter-claimants' motion for the entry of an order granting them a new trial on the complaint and counterclaim.

In its motion for a judgment notwithstanding the verdict, the defendants have in substance restated their motion for a directed verdict which was made at the end of the plaintiffs' case in chief and renewed at the close of their own defense.

They contend that the evidence on any one of several major allegations within the complaint was insufficient and that any one

such insufficiency is fatal to the jury's general verdict on the complaint.

They further contend that the verdict is contrary to the manifest weight of the evidence and contrary to law.

In support of the motion for a new trial numerous contentions are made alternatively. It is urged that a fair trial was denied because of

(1) The Court's failure to preclude any, or at least certain, references to the case of *United States* v. *Sealy,* and

(2) The plaintiffs' improper references to a prior suit between one of the defendants and the Sealy Mattress Company of Southern California, among others; and

[PST 374] (3) the Court's error in denying the defendants' motion for a mistrial, and

(4) The improper, inflammatory and/or prejudicial remarks of one of plaintiffs' counsel during trial, and

(5) The improper raising of matters in the presence of the jury which properly were issues for consideration by the Court only, and

(6) The improper use of deposition testimony by one of plaintiffs' counsel, and

(7) One of plaintiffs' counsel's improper interrogation and/or argumentation with various witnesses, and

(8) The Court's error in not precluding some or all of the testimony of an expert witness called by the plaintiffs, and

(9) The Court's error in giving certain jury instructions and in refusing to give others, and

(10) The introduction of irrelevant evidence, relating to certain patents held by one of the defendants, and

(11) The cumulative effect of the improper and prejudicial conduct by plaintiffs' counsel, and

(12) The jury's return of verdicts which were both contrary to law and contrary to the weight of the [PST 375] evidence.

## SECTION I.

## JUDGMENT NOTWITHSTANDING THE VERDICT

With respect to the first motion, plaintiffs contend the defendants were disabled from seeking judgment n.o.v. because they waived their motion for directed verdict.

If only because I know that there was no probability that any evidence presented during rebuttal and/or surrebuttal could have prompted this Court to grant any motion for a directed verdict, I feel that this is a proper case for the liberal construction commended by Federal Rule of Civil Procedure 1 in the interests of justice. Citing *Bayamon Thom McAn, Inc.* v. *Miranda,* 409 F. 2d 968, 972, the First Circuit, in 1969.

In my opinion, to reach any other result would be to enshrine form over substance. Citing *Moran* v. *Raymond Corp.,* 484 F. 2d 1008 at 1014, Seventh Circuit, 1973, *cert. denied* at 415 U.S. Reports 932 in 1974.

Accordingly, the judgment n.o.v. motion is deemed to have been properly filed.

In arguing the verdict in question is contrary to law, defendants in part assert that the complaint fails to properly state a cause of action. They find it "difficult to imagine how, under any circumstances, Sealy's entire system of licensing the manufacture of Sealy products could be deemed unlawful," and suggest that the affirmance of the jury's findings of [PST 376] antitrust law violations "would be a large step, requiring wholly novel antitrust law and having wide repercussions on large segments of industry."

When presiding over the trial on the complaint, I proceeded upon the basis that the plaintiffs had sufficiently stated a proper cause under the statute; I do not now reverse that finding.

While this is indeed a rather novel case, I believe such an affirmance would not require wholly novel antitrust law. See, for example, *U.S.* v. *Topco Associates, Inc.*, 1973-1 Trade Cases, Section 74,185 at 94,156, Northern District of Illinois, 1973 and 1973-1 Trade Cases, Section 74,391, Northern District of Illinois, 1973, affirmed, 414 U.S. Reports, and *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F. 2d 894, Fifth Circuit in 1973, and *cert. denied* in that case at 412 U.S. Reports 923, 1973.

Plaintiffs did allege and contend at trial that the defendants committed both so-called "per se" and "rule of reason" violations of the antitrust laws. Plaintiffs claimed that the defendants and their co-conspirators violated these laws by maintaining an aggregation of trade restraints and that none of the violations could be justified simply as a reasonable step toward implementing an otherwise valid trademark licensing system. Citing *Fontana Aviation, Inc.* v. *Beech Aircraft Corporation*, 432 2d 1080 at 1084, Seventh Circuit in 1970, *cert. denied* at 401 U.S. Reports 923 in 1971.

[PST 377] In arguing the verdict in question is contrary to law, defendants further assert that the instructions relating to the antitrust laws were erroneous. The jury was instructed that certain business practices are illegal in and of themselves. Such practices were said to include market allocation, group boycott, tying and price fixing.

The jury was also instructed that if no such practices were found to have occurred, it must then consider whether or not there occurred any restraints of trade unreasonable in actual effect or purpose. Citing *U.S.* v. *Citizens & Southern National Bank*, 422 U.S. Reports 86 in 1975.

Because the per se and rule of reason instructions were essentially agreed upon by the parties, defendants' assertions seem in large part to be improper. Rule 51 of the Federal Rules of Civil

Procedure; *Washington State Bowling Property Association* v. *Pacific Lanes, Inc.*, 356 F. 2d 371 at 377, Ninth Circuit, in 1966, *cert. denied* at 384 U.S. Reports 963 in 1966; citing further *Greinke* v. *Yellow Cab Company*, 250 F. 2d 865, 866-7, Seventh Circuit, in 1958.

The charge to the jury was not clearly erroneous. Citing Hobart, *supra*, 471 F. 2d at 904.

An objection was voiced to instructing the jury that certain practices are illegal. That objection was properly overruled since antitrust doctrine establishes "certain business relationships are per se violations [PST 378] of the Act." See *U.S.* v. *Topco Associates*, 405 U.S. 596 at 607, 1972.

The jury was instructed by agreement on which of the certain practices were alleged in this case and on what each of those practices meant. All the practices which were alleged have long been recognized as per se unreasonable, which were so instructed in the instructions to the jury, and thus capable of being violations of the antitrust laws.

Consistent with my earlier denial of plaintiffs' motion for summary judgment on the complaint, it became the jury's task to make factual determinations about the defendants' activities and thereafter to determine whether or not any of those activities sufficiently constituted any of the illicit business practices. Citing Washington State, *supra*, 356 F. 2d at 376.

Even if the defendants properly had assigned as error the giving or failure to give instructions relating to the antitrust laws, judgment n.o.v. would still be inappropriate.

I continue to find the instructions in question adequate expressions of the law in the case, and even if there were both proper assignments of errors and errors-in-fact in the instructions, it would still seem to me to be inconsistent with substantial justice to the plaintiffs to enter judgment n.o.v. on the complaint. See Rule 61 of the Federal Rules of Civil Procedure.

[PST 379] In arguing that the verdict in question is contrary to the evidence, defendants assert that the evidence, taken in the light most favorable to the plaintiffs, fails to establish either violations of the Sherman Act, whether the multitude of alleged offenses are viewed separately or in the aggregate, or any injury to the plaintiffs, assuming there were antitrust violations.

Since issues of fact are jury matters and since the Court thus should not substitute its own opinions or findings for that of the jury, defendants' motion for judgment notwithstanding the verdict should only be allowed if there were no substantial evidence whatsoever upon which the verdict and any essential finding thereunder could be based.

The task of reviewing the evidence on the complaint here was quite difficult. The amount of evidence put forth during the course of trial was voluminous. As one court has recognized, "Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors, a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices." *Lind* v. *Schenley Industries, Inc.*, at 278 F. 2d 79, 90 to 91, Third Circuit in 1960, *cert. denied*, 364 U.S. Reports 835 in 1960.

[PST 380] The trial herein certainly was lengthy and complicated and dealt with many matters unfamiliar to the lay person. However, after carefully reviewing all relevant evidence on the complaint, I find that there was sufficient evidence at trial to support the jury's general verdict on the complaint.

Accordingly, although the judgment on the complaint might well have been different had the trial proceeded without a jury, the verdict on the complaint and the judgment thereon cannot now be overturned as being contrary to the evidence.

SECOND, ITEM II, THE MOTION FOR A NEW TRIAL.

With respect to the second motion, the movants urge me to consider all grounds put forth in support of the first motion. In accordance with my decision to entertain the first motion notwithstanding the plaintiffs' objections, such a consideration is now appropriate. Yet, in view of my ruling on the motion for judgment notwithstanding the verdict, those grounds I have just mentioned could be found each in of itself to be insufficient to justify the entry of an order granting the movants a new trial on either the complaint or the counterclaim.

Movants urge me to consider as a ground for a new trial the introduction of irrelevant evidence relating to two particular patents held by one of the defendants.

[PST 381] While technically I need not consider this because of the movants' untimeliness under Rule 59(b), such a consideration should now be made in the interests of justice and notwithstanding the fact that the respondents may not have received proper notice of this ground and certainly have not had the opportunity to be heard on it.

However, though the lack of notice and opportunity to be heard is a procedural deprivation, I find it insufficient for the motion or the objection since I am of the opinion that this ground alone would not support the granting of a new trial motion.

It is urged that a new trial is necessary because of the Court's errors in giving at least four improper instructions and in refusing to give at least six properly tendered instructions. Upon due consideration, I believe that I should not reverse my earlier determination that the instructions as a whole should serve to guide a "model jury," if there be such, to a correct understanding of the questions which it was to decide and of the pertinent principles of the law it was to apply to the issues of fact. *Riley* v. *Layton*, 329 F. 2d 53 at 58, Tenth Circuit in 1964.

Another asserted basis for a new trial order is the Court's errors in allowing the testimony of Dr. Mueller, an economic expert witness, and in admitting into evidence during plaintiffs' rebuttal certain exhibits prepared by him. This was unfair to [PST 382] the defendant, but, again, upon due reflection, I find this, standing alone, no reason to reverse my earlier determinations.

A new trial is urged to be necessary because of both the irrelevant nature and highly prejudicial effect of the testimony and commentary at trial regarding the case of *Sealy Mattress Company of Southern California* v. *Sealy, Inc.*, 346 Fed. Supp. 353, Northern District of Illinois, 1972. On the matter of relevance, I remain convinced that matters with relation to the California case were woven into the fabric of the case before me, and that references to such matters were appropriate.

Prejudice, however, could lie by the manner in which such references were made.

For example, I was unsuccessful in keeping out information to the effect that I was the judge in that case, thus leaving to the jury the impression that I earlier had myself found defendants to be antitrust violators.

The question is whether the probative value of the references to the case outweigh the possible prejudicial effect on the defendant-counterclaimant or others.

After carefully reviewing those portions of the record involving the irrelevant references, I find that whatever prejudice may have occurred itself standing alone for this reason would be insufficient for granting a new trial. Rule 61 of the Federal Rules of Civil Procedure.

[PST 383] Similar claims of irrelevance and prejudice are voiced regarding the case of *United States* v. *Sealy*, 338 U.S. Reports 350, 1967. Again, I remain convinced that evidence of

certain circumstances surrounding this earlier case was relevant to the case at bar and that if such references were carefully handled they properly should be allowed. Here, again, I tried hard to keep the references within non-prejudicial limits.

But a reading of the transcript reveals a spreading over of such references to include inferences to the jury that the Supreme Court had found the defendants to be persistent antitrust violators.

On the whole, the admission of evidence concerning this case itself and these inferences that were left into the evidence standing alone would not so deny the defendants and counterclaimants a fair trial to the end that a new trial would be warranted.

The final and most compelling contention in support of the new trial motion involves the cumulative effect of the improper and prejudicial conduct by plaintiffs' counsel during trial. Said conduct can be said to include, inter alia, the asserted improprieties in making use of certain deposition testimony; in interrogating or arguing with certain witness; in raising various non-jury issues in the presence of the jury, and in making disparaging comments about certain adverse witness, [PST 384] opposing counsel and defendants.

In my opinion this contention presents the most serious argument in favor of overturning the jury's verdicts. It is clear that there was much improper and prejudicial conduct during the course of the trial. Plaintiffs admit as much when they argue that "Many of the 'venomous remarks' complained of were made in response to improper statements by counsel for National Sealy."

The question is whether or not the cumulative effect of all such conduct was so great as to affect the result of the trial and to thus deny the litigants a fair trial on the merits of their claims. At this moment I will leave that issue open.

## SECTION III. JURY TRIAL.

Neither party raises, but sua sponte I should raise, the issue of the propriety of the trial of this case before a jury. Under our local rule a civil case is tried before a six-person jury.

This is a statutory cause of action for which I am of the opinion that a jury right is not necessarily mandated by the Constitution. There are differences of opinion on this issue which I recognize. Perhaps I should have overruled both parties and refused to permit a jury. To have done so, however, I would [PST 385] have had to have been, prior to trial, in a position to find and hold that this case would be beyond the practical abilities and limitations of juries and thus this case is one that would fall outside the scope of the Seventh Amendment.

Let me footnote a quote from a compelling argument by the national authority in antitrust litigation, Attorney Francis R. Kirkham in his article on Complex Civil Litigation, written for the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.

He said:

> "Let me turn to a final topic which, at first glance, may seem to shake old foundations—the use of juries in complex civil litigation.
>
> "And since one picture is sometimes better than a thousand words, let me give you this picture:
>
> "Recently an antitrust suit charged conspiracy by three large grocery chains. The attorneys discussed the case, defendants' attorneys pointed out why they felt this suit was without merit. After what must be assumed was a fair appraisal of his case by plaintiffs' attorney, the largest of three defendants settled for less than $40,000, another for less than $50,000—each a typical nuisance settlement, as anyone familiar with antitrust litigation will recognize. The third

defendant had the opportunity to make even a smaller settlement, but convinced of its [PST 386] innocence and unwilling to pay Danegeld, went to trial. The jury returned a verdict against it, trebled, of $30 million dollars.

"It is difficult," he goes on to state, "to imagine a less appropriate mechanism for the determination of facts in a protracted and complicated suit than the civil jury. Because of the quantitative scale of most antitrust, securities and class action cases, and because the intellectual effort called for defies comprehension by a jury wholly inexperienced in the resolution of such matters, a jury is simply unqualified to participate in such cases.

* * *

"While the civil jury is enshrined with constitutional status in this country, the United States is the only major industrial country in the world which has preserved jury trial in civil cases. Juries are unknown in the European civil code countries, and in England, where the jury system originated and to whose great history we turn for a definition of our fundamental rights, trial by jury is discretionary with the judge in all but a few types of civil cases, such as libel and slander. It can hardly be concluded, therefore, that the civil jury is an indispensable element in a fair judicial system.

Nor can it reasonably be supposed that the founding fathers, when they 'preserved' the right to [PST 387] trial by jury in 'suits at common law, where the value shall exceed $20,' intended to mandate a jury in a modern antitrust or securities case, extending over months of trial, with complicated issues totally beyond the jury's comprehension.

"The most recent views of the Supreme Court recognize this and hold that a case beyond the 'practical ability and limitations of juries' is a case which falls outside the scope of the Seventh Amendment, just as at common law complex issues of accounting were triable without a jury.

## SECTION IV. CONDUCT OF COUNSEL.

The conduct of counsel for Ohio-Sealy during the trial went well beyond that zeal that should have been permitted. There were remarks and acts of appeal to passion and prejudice of the jury.

There were inferences of intentional suppression of facts by defense counsel made by counsel for the plaintiff. This is one of the most unfair comments that can be made, particularly in a case in which the jury is permitted to know that the role of the plaintiff is that of a private attorney general authorized under the law to act on behalf of the general good of all the people.

[PST 388] What happens is that the jury that is expected to find compensatory damages if they find violations, build up an executor's distaste for the defendant, and not only more easily find violations but also find punitive damages in place of compensatory damages.

This in turn is of particular importance in a case in which Congress so expects damages to be realistic that it provided by statute a tripling of the damages to be found and preempted the act of punishment.

This record shows what may or may not have been a stratagem, but what continued to be a problem with which the Court sought endlessly to work. What I refer to is the numerous remarks made by plaintiffs' counsels that were disparaging of the defendant, its witnesses and its counsel. Characteristic of such remarks is that recited in defendants' brief regarding the statment made during the course of the testimony of the witness *Claire* v. *Hansen:*

> "It is a lot harder to crack a phony story than to tell it in the first place, Judge."

Another that is also recited:

> "If the Sealy organization is in favor of it it is most probably illegal."

This record is exceptional as trial records go because of these types of remarks by plaintiffs' counsel in the presence of the jury.

[PST 389] A trial judge has difficulty managing a protracted case before a jury. Where prejudicial remarks begin to come in from counsel on one side or the other, he seeks to prevent their having an effect upon the jury's determination to be fair. He does this by being what may be called an equalizer. He calls as little attention to it as he can, while seeking to keep counsel in line.

If he speaks too severely about it he may cause the jury to dislike the attorney in error; if he speaks too easily about it, he lends value to the disparaging remarks.

When a protracted trial is punctuated by such remarks over a substantial period of time, the judge who hasn't granted a new trial and started all over reaches a point of no return, beyond which it is wiser to try to see the matter to its conclusion, and hope that the prejudice engendered by these things is not reflected in the verdict. He hopes that the determination of the jury is not so grossly in error or unjustified that the case cannot be salvaged.

In my re-reading the entire file and reconsidering my instructions to the jury, I am convinced that a substantial impact was made on the jury by these and other similar matters, to the end that the jury was unduly convinced that the defendant Sealy was a company which over the years had always been found and was here being again found to be an "habitual" antitrust violator.

[PST 390] A Jury with its mind so set could not easily distinguish between per se violations and the exercise of a contractual right which would violate law only if exercised as a part of an unlawful scheme to restrain competition.

The right of first refusal is just such a lawful contractual right as ought not be found to be an antitrust violation unless the jury is clearly satisfied from a preponderance of the evidence that in each

instance of its exercise it was used as a part of an unlawful scheme to restrain competition.

This is the area of the case in which the plaintiffs' evidence, though sufficient to go to the jury, was so close than any non-evidentiary disposition or extra-evidentiary bias could suffice to cause it to be treated like a per se violation.

At the same time, this is the area to which the plaintiff attaches its largest claim for damages, in the amount of $6,227,294. And the jury's general verdict as to damages was less than six hundred thousand dollars more.

A careful analysis of the evidence to support the claim that with relation to the defendant's exercise of the contractual right of first refusal, the subject matter of the claim for which plaintiffs request the largest sum of damage, reveals that as to one of the [PST 391] incidents the evidence offered to support plaintiffs' claim was speculative.

As to another incident there was no direct evidence to sustain plaintiff's claim that the defendant was acting under the contract for the express purpose of defeating the plaintiff's right and opportunity to compete.

As to the third the evidence was such that reasonable men might differ, but here again the determination of damages, if any, called for speculation.

What happened was that there was a carry-over by the jury of extra-evidentiary bias against the defendant created by these matters which I have heretofore discussed.

This trial reached the jury in the form of a competition between the personalities of lead counsel for each side. Plaintiffs' counsel was a very good counsel; he was young, brash, explosive, dramatic, exciting and at center stage at all times, even when his opponent had the floor.

Defendants' counsel is a very good counsel. He was mature, cautious, calm, matter-of-fact, and except at rare moments, courteous, even when abuse drove him to plead for help from the Court.

In a brief trial before a large jury, as in criminal cases, unless the trial court effectively keeps the jury [PST 392] onto the facts and the law, this kind of competition can bring about many miscarriages of justice.

When you are talking about a protracted, highly specialized litigation before a six-person jury, it is the instance of an accident when the result is, as to both violations and damages, devoid of a gross miscarriage of justice.

In the case at bar I find that as to violation a general verdict in favor of the plaintiff was by accident not a miscarriage of justice; but the impediments and irresponsibilities of the system emerged to contaminate the jury's decision on the damages. Such is a circumstance which presents itself in this case.

The size of the jury's verdict was shocking. At the time it was returned I considered it shocking and asked, "How did it happen?" I am convinced that had I been skillful enough to immunize the jury over its eighteen weeks of trial against the prejudicial and disparaging colloquy of plaintiffs' counsel, the amount of the verdict would have been substantially less and perhaps the antitrust violation as it related to the use of franchisor-franchisee contracts carrying the right of first refusal clauses would possibly have not been considered in arriving at a verdict as to damages.

I am not convinced by the defendants that the case should be taken away from the jury nor a new [PST 393] trial granted on any one of the many other grounds that are raised.

I acknowledge that this was a most difficult case to handle on trial and one that defies practicality when necessarily left to the

ultimate determination of six men and women without experience or expertise in fields of endeavor which would indicate a capacity to understand the complexities of business competition and anti-trust law. They tried hard and it seems to me that, except for the excessive size of their verdict, by sheer accident they properly found antitrust violations.

But, equally, I am convinced that the excessiveness of their verdict is due entirely to extra-evidentiary bias and the other matters which I have discussed before.

## SECTION V. REMITTITUR.

On the motion for a new trial it is, as has often been quoted, the duty of the judge to set aside the verdict and grant a new trial when it will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the directing of a verdict. Citing *Charles* v. *Norfolk and Western Railway*, 188 F.2d 691 at 695, Seventh Circuit, *cert. denied*, 342 U.S. Reports 831, in 1951; citing *Moist Cold Refrigerator Company* v. *Lou Johnson Company*, 249 F.2d 246 at 256, Ninth Circuit, 1957; *Altrichter* v. *Shell Oil Company*, 263 F.2d 377, 380, Eighth Circuit in 1959.

[PST 394] The trial court must always act to prevent a gross miscarriage of justice. Here I find no need to grant a new trial where the result of the prejudice is directly traceable to excessive verdict damages. There is no question about the duty of the Court to use remittitur to cure an excessive verdict resulting from error of this nature.

Most courts will uphold a verdict unless it is "grossly excessive" or "shocks the Court's conscience." Some courts have set aside a verdict in less extenuating circumstances than those recited here. See 6 Moore's Federal Practice, Section 59.05(3) 59–53.

Remittitur is a device to correct the injustice of an excessive verdict without the necessity of a new trial. Its function is to take the place of a new trial when the jury has arrived at a verdict that would allow the Court to order a new trial. See *Glazer* v. *Glazer*, 278 Fed. Supp. 476 at 482, District of Louisiana. See also *Bucher* v. *Krause*, 200 F.2d 576 at 586, Seventh Circuit, with *cert. denied* at 345 U.S. Reports 997 in 1953.

See *Goss* v. *Gamble-Skogmo, Inc.* 357 F.2d 215, Seventh Circuit, *cert. denied* at 384 U.S. Reports 943, 1966.

I cannot impose a remittitur upon the plaintiff but I can offer it in lieu of the granting of a new trial. *Northern Pacific Railway Company* v. *Herbert*, [PST 395] 116 U.S. Reports 642, 1886.

Accordingly, and in view of all of the foregoing, it is ordered that upon plaintiffs' acceptance of a remittitur in the amount of 50 percent of the jury's verdict, that is, $3,407,426, the defendants' motion for a new trial also will be denied.

The parties will return before me on the tenth day hence, on, to-wit, May 27th, 1976, at ten a.m., to receive plaintiffs' answer. If plaintiffs so accept, plaintiffs also on that occasion will wish to present their proposed order for further relief as prayed for in their complaint. At that time final orders of this Court will be entered.

Mr. Brace: Thank you, your Honor.

# UNITED STATES DISTRICT COURT
# FOR THE NORTHERN DISTRICT OF ILLINOIS
# EASTERN DIVISION

No. 71 C 1243

OHIO-SEALY MATTRESS MFG. CO.,
et al., *Plaintiffs,*
V.
SEALY, INC., et al., *Defendants.*

## MEMORANDUM OPINION AND ORDER
## (JANUARY 25, 1977)

Generally, in a case such as this the final orders of the Court are incorporated in a formal and published opinion. It is a case that has occupied much of the time of the lawyers in it for a number of years. The many briefs they have filed in it reflect the excellence of their commaad of the field of antitrust law, and ought themselves be bound in a single volume that would serve well as a text book in this highly specialized area of the law.

My review of the authorities on the issues involved in this concluding decision, however, has caused me to approach this task in another manner. I am convinced that the law involved is uncertain and difficult to marshal and that a published opinion by me may well not serve the best interests of the state of the law. For that reason, I have determined to discuss rather informally with thc parties, over the bench and on the record, my determinations and the reasons for them. A more formal recitation of them, however, shall be separately typed and filed in the case.

That, I believe, will satisfy the requirements of Rule 52, Federal Rules of Civil Procedure.

When in an action at law damages are awarded for an injury for all harm—past, present, and future visited or to be visited upon the complainant as a result of that injury—equity will not

enter to exercise its powers unless the circumstances justify the conclusion that without its intervention the same injury will occur again. It is not enough if the contemplated future injury is of a similar nature or will occur between the same parties or between parties similarly situated. The criterion is that the injury that will occur again must be the same injury between the same parties; and the occurring again must be a reoccurring, and not otherwise a continuation of the effect of the original injury. Of course, if the transaction we label an injury is itself a continuing on-going transaction, as differing from the on-going effect of the injury sued upon, it is enjoinable.

Equity does not enjoin the future commission of a wrong where there is no basis upon which to determine that the wrong will be committed, and the fact that one has committed a wrong in the past and has the capability of committing it in the future will not serve to be such a basis. Thus equity will not enjoin the commission of a crime, even though the one to be enjoined has committed the crime before and has the capacity to commit it again. For each crime there is a legal remedy sufficient unto itself. So for each civil wrong, where there is a civil remedy, equity may not be used today to preclude the use of the civil remedy tomorrow. It is where the civil remedy for tomorrow's wrong is inadequate or no longer exists that equity will come to the aid of him who will be wronged tomorrow.

When plaintiffs commenced this antitrust action, they asked for both money damages and equitable relief, and they have persisted in their demand for both types of relief throughout the case. After a trial on the issues, a six-person jury rendered a verdict for the plaintiffs and against the defendants in an amount which when tripled by operation of law measured in round figures almost twenty and one-half million dollars. In lieu of a new trial, plaintiffs accepted a remittitur of 50%. I now have completed an evidentiary hearing and extensive arguments on the question of equitable relief, and finally must answer whether under the

circumstances of this case plaintiffs are entitled to any equitable relief, and if so, to what extent and in what manner must defendants be enjoined.

The complaint alleged that defendants violated Sections 1 and 2 of the Sherman Act by virtue of and by conduct growing out of defendants' pursuit of various provisions of a licensing agreement between defendant and its licensees, of whom plaintiff was one. For example, defendants exercised a contractual right of first refusal, and as a result, acquired three of its licensees which plaintiffs had wanted and had sought to acquire. Def ndant required its licensees to purchase certain specific component parts to be used by them in their manufacture of Sealy mattresses. These parts were available only from specified manufacturers or companies owned in whole or in part by defendants. These are just two of the numerous matters of which plaintiffs complained.

When the case went to the jury, the jury was given forms for a general verdict only. Thus, without its being able to inform the parties and the Court of what specific acts of the defendants it considered to have been in violation of law, the jury was permitted to find liability based on any one or more of several theories of wrongdoing, *i.e.*, market allocation, group boycott, price fixing, and tying.

There was the theory that this conduct involved per se violations of law, to which, if established to the satisfaction of the jury, there could be no defense.

Then there was the theory that the exercise of the contractual right of first refusal called into play the Rule of Reason test for liability, and that the evidence was sufficient for the jury to find that the defendants did not act in good faith in any of the acquisitions.

These theories were given the jury in the alternative with authority to apply the applicable test as to each of the claimed violations.

A monopolization instruction also was given the jury, and I then instructed the jury of the eight categories into which the plaintiffs' claims fell.

It was against this backdrop of multiple theories and claims of liability that the jury was permitted to determine a general verdict. Plaintiffs acquiesced in this general verdict. No demand was made for special verdicts, for special findings, or for answers to specific interrogatories.

It is worth repeating that the most difficult task in looking to the question of equitable relief is coordinating specific injunctive orders, if these are to be such orders, with the jury's verdict; for equitable relief must not "do violence" to the jury's verdict. Rather, it must be consistent with the verdict. *Florists Nationwide Telegraph Delivery Network* v. *Florists Telegraph Delivery Associations*, 371 F. 2d 263, 271 (7th Cir. 1967), *cert. denied*, 389 U.S. 909.

If the injury found by the jury is of a continuing nature, or may be found from the greater weight of the evidence to be an injury that will in the same manner occur again in the future, very definitely, whatever it is, it must be enjoined.

Specifically, plaintiffs request three kinds of equitable relief. (1) They seek to stop the defendants henceforth from maintaining the various provisions of the licensing agreement, almost all of which plaintiffs claim by virtue of the general verdict to have been found to have been illegal. (2) They seek to have me restrain defendants from buying component parts for the Sealy products from suppliers approved by or owned by the defendants. And (3) they seek of me an order of divestiture to cause the defendants to turn over to the plaintiffs the Florida, Pittsburgh, and Philadelphia licensees.

The question here is whether the plaintiffs are entitled to any type of equitable relief under the circumstances of this case,

and, if so, what should be its nature and extent. But this question is preempted by a preliminary question, *i.e.*, can a general verdict, under the circumstances of this case, be the basis for the equitable relief requested. The plaintiffs urge that all disputed issues of fact are deemed to have been decided in favor of the recipients of a general verdict. They cite *Wong* v. *Swier*, 267 F.2d 749, 757 (9th Cir. 1959); *Bank of America National Trust and Savings Association* v. *Hayden*, 23 F.2d 599, 602 (9th Cir. 1956). Incidentally, while these cases recite the proper test rule for sustaining a verdict attacked on appeal, they do not address themselves to the equity problem of this case. Cf. *Security Insurance Company of New Haven* v. *Johnson*, 276 F.2d 182, 188–9 (10th Cir. 1960).

Logic and fundamental fairness dictate that a general verdict in a multiple issue case cannot be construed as a finding of illegality with respect to each and every allegation of wrongdoing found in the complaint, and neither statutory provision authorizes nor compelling public interest dictates such a finding as a matter of law. This conclusion is even more inescapable where the instructions of the law given the jury include alternative theories for testing liability.

Consistent with my observation of August 13, 1976, the verdict in this case can be deemed neither to have established that any one of the specific contractual provisions in and of itself was illegal, nor to have determined that any particular combination of them constituted illegality under the Act. In the same vein, I find that the general verdict cannot, for the purposes of my decision here, be deemed to have determined that any one or combination of the practices of the plaintiffs constituted price-fixing, or constituted group boycott, or constituted tying, or market allocation.

The most that can be surmised from the verdict is to be found not from the form of the verdict, but from the amount of damages. It is a strong supposition—not determination. It is that

the jury found some liability with respect to the acquisition by the defendants of the Florida, Pittsburgh, and Philadelphia licensees. However, it cannot be determined from the verdict and the amount of damages whether it was the existence of the right of first refusal clause in the contract, or the manner in which in one or more of these acquisitions the contract clause was exercised that was in violation of the Act.

We must recognize that even if civil liability in an antitrust action is clearly established, whether or not in the exercise of sound discretion the Court should grant a request for equitable relief must be predicated upon the traditional principles of equity, as they apply to the antitrust laws, including a threatening future injury, the convenience and effectiveness of court administration of the relief, and a balancing of the public's interest with the private needs of the complainant. *Zenith* v. *Hazeltine*, 395 U.S. 100, 130-131 (1968); *Bray* v. *Safeway Stores*, Inc., 395 F. Supp. 351, 867-868 (N.D. Cal. 1975).

The evidentiary hearing on equitable relief has as its primary function the investigation of these fundamental equitable considerations. In this case, such investigation should assist the Court in making equitable determinations about the licensing agreement itself, the continuing or future practices of the plaintiffs with relation to such matters as component parts, the determinations to be made regarding the location of plants, passover payments, warranty charges, national accounts, and, of course, the future acquisitions by the defendants of other licensees, as well as the future operation by the defendants of the Florida, Pittsburgh, and Philadelphia licensees.

Plaintiffs' request that I enjoin defendants from enforcing the provisions of the licensing agreement relative to plant location, exclusive manufacturing territories, the provision restricting the manufacture of non-Sealy label mattresses, the right of first refusal, passover payments, warranty repair charges, royalties on non-Sealy products, and national accounts.

Considering both the jury verdict on the evidence presented in the case before the jury and the evidence presented in the hearing on equitable relief, I am unable to find either future illegality in the pursuit by the defendants of any one of these provisions, or illegality in the future pursuit of any combination of them.

Each of these several provisions of the licensing agreement, I find from the facts before me for this determination, is a legitimate and accepted business practice, used extensively through the business community, important to the promotion of inter-brand competition. I find from the evidence that may be considered in this phase of the case, that the nature of the mattress industry dictates the priority of inter-brand competition over intra-brand competition from the perspective of the public interest, and that with relation thereto the needs of the plaintiffs are not unduly threatened in the future by pursuit by the defendants of the provisions of the licensing agreement, except such combined pursuit of them or certain of them as a part of a deliberate scheme and design to frustrate the plaintiffs' opportunity to engage in intra-brand competition, in such manner as must have been found by the jury to have been followed in the case they decided. The judicial administration of a general injunction, if any were dictated under these circumstances, would be impracticable, unmanageable, and for the purpose of saving for the plaintiffs the cost and time of a future litigation for damages, it would be totally unwarranted. I am unable to find from the verdict of the jury and the evidentiary hearing on equitable relief, facts supporting plaintiffs' position to the effect that the continued pursuit of these contractual provisions, or any combination of them, absent an intentional purpose to completely deprive plaintiffs of the opportunity to compete, will result in irreparable injury to plaintiffs. If, in fact, Sealy, Inc., were to use these contractual provisions for the clear purpose of visiting injury upon plaintiffs, plaintiffs' remedy at law, *i.e.*, damages, would be more adequate than would be a general injunction or a series of specific injunctions. Since neither

the jury verdict nor the hearing on equitable relief has established the unlawfulness of the contractual provisions, an attempt at injunctive relief would be a serious error.

My position on this matter is further strengthened by the very nature of this action. Significantly, it is a suit on behalf of a private party and not on behalf of the general public. As stated before, the public interest will not be served by this court's rewriting the licensing agreement and reorganizing the defendants' structure. In addition to the inappropriateness of a general injunction and the unavailability of a series of specific injunctions, is the fact that the general public, which includes plaintiffs, has the benefit of an injunction against the defendants that is still viable. That injunction is in the earlier case in this district of *United States* v. *Sealy*, 60 C 844.

By their second form of requested equitable relief, plaintiffs would have me enjoin defendants from continuing certain practices whereby defendant has required its licensees to purchase component parts from approved suppliers. My findings with relation to the contractual provisions relate equally to component parts.

Plaintiffs ask for divestiture in the matter of the acquisitions. But here the unascertainable nature of the basis for the jury's verdict leaves the Court without a guide as to which of the acquisitions need be set aside and to what extent. Plaintiffs say that this remedy constitutes restitution and is called for to rectify and prevent unjust enrichment.

Initially, I observe that there is a considerable question of whether or not this court or any other court is empowered to order divestiture in a private antitrust suit under Section 16 of the Clayton Act. See *e.g.*, *International Telephone and Telegraph Corporation* v. *General Telephone and Electronics Corporation*, 518 F.2d 913 (9th Cir. 1975); *Calnetics Corporation* v. *Volkswagen*

*of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 45 U.S. Law Week 3345 (Nov. 8, 1976); but cf. *N.B.O. Industries Treadway Companies, Inc.* v. *Brunswick Corporation*, 523 F.2d 262 (3rd Cir. 1975).

Even assuming arguendo that divestiture would be proper under Section 16 of the Clayton Act, it is such a drastic remedy that it need not necessarily be applied where other remedies will provide sufficient relief to the plaintiffs. *N.B.O. Industries, supra.* Plaintiffs have been fully compensated by the jury verdict for any harm they have suffered as a result of the acts complained of in the pleadings herein. The statutory trebling of damages carries the inference that the full size of the injury is to be compensated for in money damages.

Ironically, were I to grant plaintiffs request for divestiture, plaintiffs, not defendants, would be unjustly enriched. Plaintiffs would be awarded both the assets it sought to purchase and the damages assessed by the jury.

Moreover, restitution is not available under Section 16 of the Clayton Act for the harm that may have been experienced when it already has been compensated for by damages given under Section 4 of the Sherman Act. See *e.g., In re Multidistrict Vehicle Air Pollution;* 538 F.2d 231, 234 (9th Cir. 1976).

In view of all the foregoing, I am denying each of the requests of plaintiffs for equitable relief in this case. And it is so ordered. Wherefore, I am entering of record the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Plaintiffs are Ohio-Sealy Mattress Manufacturing Company, and four of its wholly-owned subsidiaries, Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy of the Northeast, and Sealy Mattress Company of

Georgia. Each plaintiff is a licensee of defendant Sealy, Incorporated, and each is engaged in the manufacture and marketing of mattresses and boxsprings.

2. Defendant, Sealy, Incorporated, is a Delaware corporation engaged in the business of licensing mattress manufacturers to manufacture and sell mattresses, boxsprings and related bedding products under Sealy's trade names and marks. It has three wholly-owned subsidiaries engaged in the business of manufacturing and selling innerspring units and six wholly-owned subsidiaries and one subsidiary engaged in the business of manufacturing and selling mattresses, boxsprings and related bedding products.

3. The plaintiffs' complaint alleged numerous violations of the antitrust laws based on various provisions in the defendants' license agreement with its licensees, on the exercise by defendants of a so-called right of first refusal to acquire three of its licensees, and on certain practices of defendant with respect to components purchased by plaintiffs for use in the manufacture of mattresses. The complaint sought both damages and equitable relief.

**The Jury Verdict**

4. After an eighteen-week trial, the case was submitted to a six person jury under instructions that permitted the jury to hold defendants liable on the basis of any of a number of different theories of violation of the antitrust laws and with respect to any of a number of different categories of claimed damages.

5. The theories of liability submitted to the jury included market allocation, group boycott, price-fixing, and tying, all as possible *per se* violations of the antitrust laws; the use of a right of first refusal as part of an unlawful scheme; the foregoing grounds of liability considered alternatively as possible unreasonable restraints of trade rather than *per se* violations; and monopolization.

6. With respect to six specific provisions of the defendants' license agreement, the jury was charged that such provisions were

not in and of themselves unlawful but that they would be unlawful if used in such a way as to achieve or maintain an arrangement which limits or restricts in any substantial way the geographic areas in which products may be sold. Under the instructions the jury could have determined (1) that one or more of those license provisions, or some combination of them had been used in such a way as to constitute a *per se* violation; or (2) that one or more of such license provisions, or some combination of them had been used in such a way as to constitute an unreasonable restraint of trade; or (3) that none of them had been used in such a way as to constitute either a *per se* violation or an unreasonable restraint.

7. The instructions did not require the jury, in order to hold defendant liable, to conclude that the license provisions or any one or any combination of them had been used in such a way as to constitute a violation of the antitrust laws.

8. The jury was instructed that plaintiffs' damage claims fell into eight different categories. The summary of damage claims presented by the plaintiffs to the jury included approximately twenty different items. The jury was not instructed that it was required to award damages with respect to any category or item of claimed damages if it did so with respect to any other category or item. It was not instructed that it must base liability on any particular theory of violation in order to award damages on any particular category or item of claimed damages.

9. The case was submitted to the jury with instructions to return a general verdict and without any request for special findings or answers to interrogatories.

10. The jury returned a general verdict in favor of plaintiffs on the complaint and awarded plaintiffs damages in the amount of $6,814,852. On motion of the defendant for Judgment Notwithstanding the Verdict or for New Trial, the Court on May 19, 1976, ordered the granting of a new trial unless the plaintiffs

consented to a remittitur in the amount of 50% of the verdict. The plaintiffs filed its acceptance of the remittitur on May 27, 1976.

11. Plaintiffs' total damage claims as submitted to the jury amounted to $9,233,563.

12. There is no combination of items of damage as submitted by plaintiffs which equals the amount of damages as awarded by the jury.

13. The largest items of damage claimed by plaintiffs were those respecting the acquisition claims. Those claims totalled approximately $6.9 million. The amount awarded by the jury could not logically have been arrived at without including some portion of those acquisition claims. It need not have included all of those claims.

14. It is not possible to determine from the jury verdict what violation or violations of the antitrust laws were necessarily determined by the jury in arriving at its verdict. The most that can be determined is that the jury must have believed that there was some liability in connection with the defendant's acquisition of one or more of the three licensees. Assuming such a violation was determined, it is not possible to ascertain on what theory of liability such a violation was determined or whether such a violation affected one, two, or three of the acquisitions. It is not possible to ascertain from the jury verdict that the jury determined any violation with respect to any of the specific provisions of the defendant's license agreement or any combination of them. It is not possible to ascertain from the verdict that the jury determined any violation with respect to the components part of plaintiffs' case.

**The Hearing on Equitable Relief**

15. After the Court's ruling on the motions for Judgment Notwithstanding the Verdict or for New Trial, plaintiffs filed

proposed findings and a proposed decree granting equitable relief, and in connection therewith requested an evidentiary hearing for the purpose of adducing additional evidence bearing on equitable relief. Defendant opposed the granting of equitable relief and filed proposed findings in support of its position. The Court directed that an evidentiary hearing be held and such a hearing was held, covering nine trial days.

16. At the outset of the hearing on equitable relief, plaintiffs' counsel stated that he accepted for purposes of equitable relief the court's ruling that the jury verdict could not be taken as having established any violations of the antitrust laws with respect to the provisions of the license agreement or the components claims. Plaintiffs' counsel further stated that for purposes of the requested equitable relief he would assume that the challenged license provisions and practices with respect to components were violations of the antitrust laws as a matter of law. In effect, plaintiffs proposed to rely on the position they had asserted in their motion for summary judgment made in advance of the trial to the jury, which motion the Court had denied.

17. With respect to the acquisitions portion of the case, plaintiffs' counsel stated that for purposes of equitable relief he would assume that violations of the antitrust laws had been determined by the jury verdict.

18. The evidence adduced at the evidentiary hearing on equitable relief consisted generally of evidence as to the present license provisions and practices of the defendant, evidence as to the present conditions of competition in the industry, especially with reference to intra-brand competition among the Sealy licensees, and expert testimony as to the probable effect on the parties and on the public interest of each of the various kinds of equitable relief requested by the plaintiff.

**The License Agreement**

19. Plaintiffs have requested the elimination from the license contract of seven provisions, dealing respectively with (a) exclusive manufacturing territories; (b) plant location; (c) passover payments and warranty-repair charges; (d) ownership of competing brands; (e) royalties on products not bearing Sealy labels; (f) the so-called right of first refusal; (g) National Accounts.

20. For the reasons previously noted the verdict cannot be deemed to have determined that any of the foregoing license provisions constitutes a violation of the antitrust laws, or that all of them together constitute a violation of the antitrust laws, or that any combination of them constitutes a violation of the antitrust laws.

21. I am unable to find that there has been established any past violation of the antitrust laws which could be the basis for injunctive relief with respect to these license provisions.

22. For similar reasons, I am unable to find in these license provisions any threatened future violation of the antitrust laws which could be the basis for injunctive relief.

23. I find on the basis of the evidence presented to the jury and the additional evidence presented to me in the evidentiary hearing on equitable relief that each of the license provisions in question is, a reasonable and appropriate means of protecting the legitimate interests of the defendant as a trademark owner in promoting the exploitation of the Sealy trademarks through its licensees. I further find that the public interest would not be promoted by enjoining the defendant from using any or all of such contractual provisions in its business, and that such an injunction could, by weakening the effectiveness of the defendant as a competitive force in the mattress market, have adverse effects upon the public's interest in vigorous competition.

24. Passover payments are a method of dealing with the "free rider" problem. They do not constitute a prohibitive or significant barrier to inter-area sales. The royalty structure under the Sealy license is a significant incentive to any licensee to sell additional units inside and outside its area of primary responsibility. The "Product Service Repair Charge" on sales of Sealy label mattresses and boxsprings shipped outside a licensee's area of primary responsibility insures that Sealy licensees will stand behind the Sealy Warranty and that a defective mattress or boxspring will be repaired under the Sealy Warranty outside that licensee's area of primary responsibility.

25. Paragraph IV:9 of Sealy's 1968 license agreement, limiting a licensee's interest in a competitive bedding company to 5%, serves to prevent conflicts of interest or divided loyalties with the licensee. The paragraph was amended in 1972 expressly to permit a licensee to engage in a competitive mattress business anywhere in or out of its area of primary responsibility through a subsidiary using a brand name or private label owned by the subsidiary or its customers. There are ordinary business reasons for such a restriction from an economic viewpoint.

26. A royalty on non-Sealy label products encourages a licensee to exploit the Sealy label. Under the license agreement, Ohio-Sealy can manufacture private label products in a non-Sealy plant and not be subject to paying any royalties to Sealy.

27. Sealy's national accounts program is a means of enabling Sealy licensees to compete for the business of large purchasers who prefer to buy from a single source. It increases the number of competitors who can bid for such orders and is not a restraint of competition.

28. The right of first refusal in the Sealy license contract is an appropriate contractual right in an organization like the Sealy organization. Sealy, as a licensor, has an ordinary interest in having

an opportunity to acquire a licensee who desires to sell and should be allowed to bid against another prospective purchaser and to purchase one of its licensees. The right of first refusal provision allows competitive bidding for the purchase of Sealy licensees; the seller-licensee may withdraw his offer to sell after Sealy has matched the offer, decline to sell to Sealy, and thereafter receive additional bids.

29. Plaintiffs have also requested an injunction in general terms forbidding the defendant from maintaining or enforcing any "contract, combination or conspiracy which directly or indirectly has a purpose or effect of achieving or maintaining exclusive territories." No such general injunction would be appropriate in this case since the defendant is already subject to an injunction in substantially the same terms, entered against the defendant as part of the final decree in the case of *United States* v. *Sealy*, United States District Court for the Northern District of Illinois, No. 60 C 844.

**Components**

30. Plaintiffs have requested injunctive relief with respect to various alleged practices concerning mattress components, including price-fixing, the granting to any supplier of all or any share of an exclusive market with respect to components, and collecting any payments from any supplier of components.

31. For the reasons stated above, the jury verdict cannot be deemed to have determined that any one or another of defendant's practices with respect to components constituted a violation of the antitrust laws.

32. I am unable to find that any violation with respect to components has been established as a matter of law on undisputed facts.

33. I am unable to find that there has been established any past violation of the antitrust laws that could be the basis for injunctive relief with respect to components.

34. I am likewise unable to find in defendant's practices with respect to components any threatened future violation of the antitrust laws which could be the basis for injunctive relief.

35. Plaintiffs have requested that defendant be divested of its three spring-manufacturing subsidiaries. No evidence in support of that request was presented at the evidentiary hearing on equitable relief. I find no past or threatened future violation of the antitrust laws that could be the basis for any such relief, even if such relief would be an appropriate remedy for any such violations if they were found. No evidence or legal theory has been offered to establish why the defendant may not, consistent with the antitrust laws, engage in the manufacture of mattress components, and I find that the public interest would not be served by divesting the defendant of its spring-manufacturing plants.

**Acquisitions**

36. Plaintiffs have requested that defendant be ordered to divest to plaintiffs each of the three licensees (the Florida, Philadelphia, and Pittsburgh licensees) acquired by defendant as a result of its exercise of the right to meet plaintiffs' offers for those licensees (the so-called right of first refusal), at the price at which in each case the plaintiff initially contracted to purchase those licensees.

37. The jury verdict awarding damages in the amount of $6,814,852 must be deemed to have included damages for any violation of the antitrust laws that the jury may have considered in connection with these three acquisitions, even though it is impossible to determine from the general verdict whether the jury considered one, two, or all three of such acquisitions to have been wrongful as to plaintiffs or which of the acquisitions, if less than all three, was or were wrongful as to plaintiff.

38. Accordingly, plaintiffs must be deemed to have been fully compensated by the verdict for any harm it suffered as a result of

any past wrongful acts considered by the jury in connection with the three acquisitions. The compensatory damages awarded by the jury (as reduced by the remittitur accepted by the plaintiffs) will be trebled, under the mandate of the statute, in the money judgment to be entered by the Court.

39. The divestiture requested by plaintiffs would result not in "restitution" but in the double remedy for the same wrong and a double recovery, thereby unjustly enriching the plaintiffs. Such a remedy would give plaintiffs both (1) the assets it would have acquired had its proposed purchases been successful, and (2) the damages the jury determined the plaintiffs have suffered as a result of its failure to consummate the purchases.

40. For the reasons stated above, I find that there is no basis for ordering divestiture on the theory of remedying past wrongs to the plaintiffs.

41. I find that there is no other basis for requiring divestiture, either to the plaintiffs or otherwise.

42. I find that there is no other relief necessary or appropriate with respect to possible future acquisitions by the defendant. The circumstances under which the right of first refusal might be exercised at some possible time in the future would necessarily differ from the circumstances in which the past acquisitions were made. The so-called "no-sell" agreement in the Duff, Anderson program, which prohibited participating licensees from selling their businesses during the valuation phase of the program, is no longer in effect. At the hearing on equitable relief, plaintiffs presented no evidence of threatened future harm from any impending or threatened acquisitions or exercises of the right of first refusal by the defendant. Since the commencement of this lawsuit in 1971, plaintiffs have acquired two licensees, the Atlanta and Randolph licensees, without the exercise of the right of first refusal by defendant. The evidence at the hearing on equitable

relief demonstrates that Ohio-Sealy's out-of-area sales are increasing every year, that its plants are more profitable than Sealy's owned and operated plants, that it has expanded the most of any Sealy licensee in the last 20 years, that its sales have almost doubled since 1970 and net profits have risen 92%, that it considers itself to be selling in all areas east of the Rockies, and that it has been a successful organization before, during, and after the lawsuit tried to the jury; its net worth has increased more than 60% from 1969 to 1975.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction of the plaintiffs and the defendants actually served, *i.e.*, Sealy, Incorporated, Sealy Spring Corporation-Indiana, and Sealy Spring Corporation-East, and has jurisdiction of the subject matter of this action.

2. No present or threatened future violations of the antitrust laws have been established with respect to the provisions of defendant's license agreement and no equitable relief is required with respect thereto.

3. No present or threatened future violations of the antitrust laws have been established with respect to mattress or foundation unit components and no equitable relief is required with respect thereto.

4. Plaintiffs' remedy at law is adequate and plaintiffs have been fully compensated in damages for any past wrongs related to the acquisitions by defendant of three of its licensees.

5. Divestiture to plaintiffs or to any other person is not an appropriate remedy.

6. No other equitable relief is required or appropriate.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy of the Northeast, Inc., and Sealy Mattress Company of Georgia, Inc., Plaintiffs-Counterdefendants Appellants-Cross-Appellees,

v.

SEALY, INCORPORATED, Sealy Spring Corporation—Indiana, Sealy Spring Corporation—East, Sealy Spring Corporation—West, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Schnorr Manufacturing Company, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., Sealy Mattress Company of Philadelphia, Inc., Defendants-Counterplaintiffs Appellees-Cross-Appellants.

Nos. 77-1239, 77-1240.

United States Court of Appeals, Seventh Circuit.

Argued April 20, 1978.

Decided Oct. 11, 1978.

As Amended Oct. 12, 1978.

Before FAIRCHILD, Chief Judge, MOORE, Senior Circuit Judge,* and PELL, Circuit Judge.

PELL, Circuit Judge.

Sealy, Incorporated (Sealy) owns trademarks for the "Sealy" brand of mattresses, mattress foundations, and other bedding

*Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

products. The Sealy brand enjoys substantial national consumer popularity, and Sealy licenses its trademarks to fifteen independent manufacturers, each of which has the primary responsibility to make and sell Sealy products in a defined territory or territories. Sealy receives license royalties, provides uniform product specifications, and also provides for the benefit of its licensees substantial national advertising, product development services, engineering assi ce, sales training, and a means of central negotiation for se g to national retail organizations and purchasing certain mattress components. In addition, Sealy itself manufactures and sells mattresses in seven territories, and it also manufactures spring units through three wholly-owned subsidiaries.[1] Over 98% of the stock of Sealy is owned by its licensees, only licensees (or their nominees) are eligible for 11 of the 14 seats on Sealy's Board of Directors, and the Board's Executive Committee is composed exclusively of licensees.

Ohio-Sealy Mattress Manufacturing Company (Ohio) is a Sealy licensee with primary responsibility for six territories. Ohio is the largest and one of the best of the Sealy licensees, producing a high quality product efficiently, selling it effectively, and compiling an enviable profit record.[2]

In *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), the Supreme Court invalidated the system of exclusive manufacturing and sales territories on which Sealy then predicated its licenses. (Sealy at the time was not itself engaged in manufacturing mattresses.) Looking at "substance rather than form," *id.* at 352, 87 S.Ct. 1847, the Court thought it clear that the exclusive territories were restraints imposed by a

[1]The subsidiaries through which Sealy makes and sells mattresses in its seven territories and makes spring units were also named as parties to this action.

[2]Ohio services five of the territories through four subsidiaries, which are also parties herein.

horizontal combination of potential competitors, because Sealy was obviously "a joint venture of, by, and for its stockholder-licensees [who are] themselves directly, without even the semblance of insulation, in charge of Sealy's operations," *Id.* at 353, 87 S.Ct. at 1850. Because the exclusive territory system operated to give each licensee an enclave free from the competition of other Sealy licensees, it amounted to an allocation of markets *per se* violative of Section 1 of the Sherman Act, 15 U.S.C. § 1,[3] without regard to asserted justifications for the system.[4]

After the Supreme Court's decision, Sealy revised its licensing agreement, eliminating exclusive selling territories. In 1971, Ohio initiated this action, complaining that Sealy had continued to effect the evils the Supreme Court condemned, albeit by more subtle means, that Sealy's methods of dealing with national retail customers also violated the Sherman Act, and that Sealy was engaged in illegal tying and price-fixing arrangements regarding certain mattress components. Damages well in excess of $6,000,000 were claimed, and declaratory and injunctive relief was sought. Sealy counterclaimed, seeking substantial damages and other relief.

The damage claims of the parties were tried before a jury over a period of four months in 1974 and 1975. Although both Sealy and

[3]As pertinent, § 1 provides:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

[4]The district court in *Sealy* had found and enjoined a conspiracy to fix minimum retail prices, and no appeal was taken from its judgment order in that respect. While the Supreme Court pointed out the nexus between this price-fixing and the allocation of markets, 388 U.S. at 355-58, 87 S.Ct. 1847, it is clear that the latter element is illegal *per se* even though the former element is absent. *See id.* at 357 n.5, 87 S.Ct. 1847; *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 n.9, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

Ohio had several objections to the jury's instructions, no complaint thereof is made on appeal. Ohio's evidence indicated damages on its complaint of $9,233,563 (before trebling, *see* Section 4 of the Clayton Act, 15 U.S.C. § 15). Sealy's counterclaim evidence indicated damages of $14,701,479. The jury rendered a general verdict for Ohio on its complaint, awarding damages of $6,814,852, and against Sealy on its counterclaim. Thereafter, the district court denied Sealy's motion for judgment n. o. v., and denied its motion for a new trial conditionally on Ohio's accepting a remittitur of 50% of its $20,444,556 trebled damages. Ohio accepted the remittitur. After later hearings on equitable relief, the district court denied it. The court also ruled that Ohio was not entitled to interest on its judgment for the twenty-month period between the jury's verdict and the court's entry of final judgment in the case. Ohio appeals from the judgment's denial of equitable relief and interim period interest, and Sealy cross-appeals from the denial of its motions for judgment n. o. v. and for a new trial.

A fuller statement of the pertinent facts of the case will be given in the context of the issues presented for decision.

I. *Sealy's Motion for Judgment Notwithstanding the Verdict*

If Sealy is correct that the district court should have granted its motion for judgment n. o. v., most of the rest of the issues on appeal will be academic.[5] Accordingly, we consider this possibility first. In doing so, we are guided by the "well established" rule that

> a motion for a directed verdict or for judgment n. o. v. is properly denied where the evidence is such that reasonable

[5] An exception would be Ohio's prayer for equitable relief. All of the elements of Ohio's complaint were in issue in the jury trial, so if there was insufficient evidence of antitrust violations to warrant submission of the case to the jury, equitable relief would obviously be foreclosed. If, on the other hand, judgment n. o. v. should have been granted on the ground that no recoverable damages were proved, equitable relief could nonetheless be appropriate.

> men in a fair and impartial exercise of their judgment may draw different conclusions therefrom.

*Hannigan v. Sears, Roebuck and Co.*, 410 F.2d 285, 287 (7th Cir. 1969), *cert. denied*, 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178; *see also Fontana Aviation, Inc. v. Beech Aircraft Corporation*, 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 872, 27 L.Ed.2d 826 (1971). We are

> bound to view the evidence in the light most favorable to [Ohio] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.

*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962) (footnote omitted); *accord, Hannigan, supra* at 288. This is particularly true in complex antitrust cases such as this one "where motive and intent play leading roles," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), because "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses" by the trier of fact. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); *Lambert Corporation v. Evans*, 575 F.2d 132, 136 (7th Cir. 1978).

Ohio argues, as a threshold matter, that judgment n. o. v. was absolutely precluded by Sealy's failure to file a motion for directed verdict "at the close of all the evidence," which Rule 50(b), Fed.R.Civ.P., makes a necessary predicate of a later motion for judgment n. o. v. Sealy's directed verdict motion was made at the close of its case, *i. e.*, after all but certain rebuttal evidence was taken. The motion was not thereafter renewed, but we agree with the district court that Sealy adequately preserved its right to a ruling on the sufficiency of Ohio's evidence. The application of

Rule 50(b) in any case "should be examined in the light of the accomplishment of [its] particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for the truth." *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 576 (7th Cir. 1976); and *see* Rule 1, Fed.R.Civ.P.

Rule 50(b) serves the important purpose of ensuring that a motion for judgment n. o. v. is used only to invite the district court to reexamine its decision not to direct a verdict as a matter of law, and not, in contravention of the Seventh Amendment, to reexamine facts found by the jury. *Pittsburgh-Des Moines, supra* at 576. Where the court's attention is directed to a party's contention that the pertinent evidence presented entitles it to judgment as a matter of law, the motion's purpose is served. *Moran v. Raymond Corp.*, 484 F.2d 1008, 1014 (7th Cir. 1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed.2d 490 (1974). Nor does the introduction of additional evidence after a directed verdict motion necessarily call for a different conclusion, especially where, as here, the district court expressly determines that "there was no probability that any evidence presented during rebuttal and/or surrebuttal could have prompted this Court to grant any motion for a directed verdict." *See Moran, supra* at 1012; *Gillentine v. McKeand*, 426 F.2d 717, 722 (1st Cir. 1970).

Another purpose of Rule 50(b) is avoidance of making a trap of a motion for judgment n. o. v. where, *e. g.*, a directed verdict motion would point out a defect in proof that the opposing party might remedy thereafter. *Pittsburgh-Des Moines, supra* at 576. There was no possibility of any such trap here, where the directed verdict motion came after both parties rested their cases in chief. Any additional proof which Ohio could properly introduce on rebuttal was in no way foreclosed, and no suggestion is made that the motion for judgment n. o. v. hinged in any material way on

Ohio's lack of rebuttal evidence or Sealy's surrebuttal proof.[6] We conclude, as did the district court, that under this court's "liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgment," *Moran, supra* at 1014, Sealy is entitled to have its attack on the sufficiency of Ohio's evidence heard on the merits.

A. Market Allocation

The evidence in the case would clearly have allowed a jury to find the following facts with reference to Ohio's claim that Sealy was engaged in a scheme of market allocation. Soon after the Supreme Court's decision in *United States v. Sealy, Inc.*, Sealy's Board of Directors met to consider Sealy's future operations. Concern was expressed over the invalidation of the exclusive territory system, and the resulting dangers from the competition of "renegade," "out of control," "predatory" licensees, and from retailers which might attempt to play licensees off against each other to obtain lower prices. In conjunction with antitrust counsel, Sealy began the process of working out alternatives to preserve as much of the perceived benefit of its former system as the Department of Justice and the courts would allow in the light of the Supreme Court decision.

The final decree entered in *United States v. Sealy, Inc.*, 1967 Trade Cases ¶ 72,327 at 84,855 (N.D.Ill. Dec. 26, 1967) enjoined Sealy and its licensees from any arrangement "to limit or restrict any manufacturer in any substantial way to sales of Sealy products within a prescribed territory." *Id.* at 84,856. At the

[6]Ohio argues that a trap was created, because Sealy agreed to instructions inconsistent with legal arguments made in this court. This argument, even if true, bears no relationship to the question under consideration. Rule 51, Fed.R.Civ.P., forecloses objections on appeal to agreed instructions and unless, as Sealy argues, the controlling law has clearly changed, Sealy can gain no advantage from the "trap" Ohio says it attempted to lay.

proceeding during which the decree was signed, John Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice, made the following statement about the pertinent language of the decree:

> We do not interpret this language as prohibiting per se the employment of manufacturing location clauses, areas of primary responsibility clauses, or passover provisions. In so saying, we are in no way implying any view as to the legality of such clauses under the antitrust laws, nor, of course, are we suggesting that such clauses would not violate the decree if they have the effects proscribed by [its] language.

With this background, Sealy developed a new license agreement (including each of the provisions mentioned by Mr. Sarbaugh, and more) which was signed by all of Sealy's licensees, with one exception.[7] The new 1968 license agreement[8] maintained the same territories as had been used before, with Sealy promising not to license anyone else to manufacture Sealy products in a licensee's territory. The territories, however, were no longer to be exclusive as to sales. While each licensee was assigned primary responsibility to promote Sealy sales in his area, it also had the right to sell Sealy products in the territories of other licensees. Each licensee was to be held accountable for satisfactory performance in its area of primary responsibility (APR), and, as an incentive thereto, the contract provided that once the licensee achieved a certain sales quota in its APR, its royalties on all subsequent Sealy sales that year (inside or outside his APR) would be halved. Licensees were authorized to manufacture Sealy products only at

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[7]The southern California licensee successfully maintained a declaratory judgment action before the same district court judge who tried the present action, establishing that invalidation of the exclusive territory system did not nullify his prior contract in toto. *Sealy Mattress Co. of Southern California v. Sealy, Inc.*, 346 F.Supp. 353 (N.D.Ill.1972). Sealy thereafter acquired the licensee's business.

[8]The agreement was revised in 1971 and subsequently without changes pertinent to the present discussion.

the location(s) specified in their agreements and such additional locations as Sealy might thereafter approve in writing. Licensees were obliged to pay royalties on all products manufactured in licensed plants, whether or not the products were sold under a Sealy name. Products bearing the Sealy name, not surprisingly, were subject to higher royalty rates. In addition to the normal royalties, if a licensee sold Sealy products outside its APR it was subject to two additional charges. First, it would pay Sealy (and Sealy would thereafter pay the licensee whose APR was "invaded") pass-over payments equal to the percentage of the out-of-APR sales corresponding to the invaded licensee's prior year advertising and promotion expenses divided by that licensee's total sales. The precise amount of pass-over payments could not be predicted in advance in any given instance, but testimony indicated the range of payments could be from 2.2% to 11%. An additional charge was made for product service repairs on out-of-APR sales, amounting to 1% at the time of trial.[9] Sealy was to have a right of first refusal should a licensee wish to sell its business. Licensees were forbidden to acquire any interest in any competitive organization, although this provision apparently would not preclude a licensee from manufacturing and selling competitive private brand merchandise through a subsidiary.

Ohio's theory of its case was that although many or all of the provisions to which we have just referred might be legal in and of themselves, they were designed and used by Sealy in *per se* violation of the Sherman Act to achieve a division of markets. In addition to receiving a Rule of Reason instruction pertaining to all aspects of Ohio's case, the jury was told that market allocation is *per se* illegal, and that the above restrictions were not themselves *per se* illegal unless used to achieve a market allocation, *i. e.*, to limit or restrict "in any substantial way, the geographic areas in which products may be sold." Because the jury awarded

[9] The 1968 contract had set the charge at 50 cents per piece on all mattresses and box springs sold outside the APR.

damages vastly in excess of those claimed for the other aspects of Ohio's case, it necessarily found that Sealy had allocated markets. Deferring for later consideration Sealy's arguments that the evidence shows no injury and no antitrust damages to Ohio, we think it plain that the district court did not err in allowing the jury to decide whether or not Sealy had illegally divided markets.

In assessing the evidence making a jury question of market allocation, we bear in mind the horizontal nature of the restraints involved. As we have pointed out, the Supreme Court's decision in *United States v. Sealy, supra,* expressly held that the structure of the Sealy organization mandated the conclusion that its arrangements were horizontal ones. That structure, as pertinent, stands unchanged now. Sealy half-heartedly argues that the fact that it now itself manufactures and sells in certain territories introduces elements of verticality to the picture, but we cannot agree. Whatever may be said about the way Sealy conducts its business in those territories, it is indisputably clear that any restraints applied to the independent businesses which are licensees result directly from the concerted action of their horizontal potential competitors. Accordingly, as Sealy agreed by accepting the district court's instructions on market allocation, if Sealy's license agreement and its conduct thereunder amounted to substantial limitations on manufacturers' sales territories, a *per se* violation existed. See *Topco, supra; Sealy, supra; Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); *United States v. National Lead Co.,* 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947); *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

We also emphasize that Sealy's approach to the alleged restraints misses the mark. Repeatedly, Sealy argues that, *e. g.* areas of primary responsibility, exclusive manufacturing licenses, location clauses, pass-over payments, rights of first refusal, etc., have all been held at one time or another not to violate the

antitrust laws. That is certainly true enough, but we know of no authority holding that these devices, alone or in conjunction, do not violate the antitrust laws *even though they have effects plainly within the ambit of those laws.* On the violation issue, Sealy consistently refuses to address what was obviously Ohio's case theory, on which the jury was appropriately instructed in agreed language. It is thoroughly established that "[a]cts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade." *Kurek v. Pleasure Driveway and Park District of Peoria,* 557 F.2d 580, 587 (7th Cir. 1977), *judgment vacated,* 435 U.S. 992, 98 S.Ct. 1642. 56 L.Ed.2d 81 (1978), *judgment reinstated,* 574 F.2d 892 (7th Cir. 1978) (per curiam); *see Simpson v. Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed2d 98 (1964); *Poller v. Columbia Broadcasting System, Inc., supra,* 368 U.S. at 468 69, 82 S.Ct. 486. Moreover, in antitrust cases

> plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "The character and effect of a conspiracy are not be judge by dismembering it and viewing its separate parts, but only by looking at it as a whole."

*Continental Ore Co. v. Union Carbide & Carbon Corp., supra,* 370 U.S. at 699, 82 S.Ct. at 1410 (citation omitted).

Ohio proved that the mattress business is substantially local in nature, because of the bulk and weight of the product, the fact that retailers typically do not care to warehouse the product, and the need for frequent customer sales calls. As Sealy concedes, the great majority of mattress sales are made within 200-300 miles of a manufacturing plant. Exclusive manufacturing territories in the mattress industry thus tend to have the effect of limiting to some degree the areas in which any licensee can effectively compete. The jury was not instructed, however, that this effect alone would suffice to constitute an antitrust violation, and, indeed, Ohio does

not attack Sealy's exclusive manufacturing area system, except in those limited cases where a significant market is left inadequately served by a licensee's refusal to locate a plant in proximity thereto.[10]

The local nature of the mattress business and the exclusive manufacturing areas used by Sealy really do little more than set the stage for the balance of the restraints attacked. Any licensee could, *e. g.*, engage in significant intrabrand competition at least with his neighboring licensees if Sealy's restraints went no further. But Sealy did go further, as we have said. It limited its licensees to manufacturing at specified locations. While no one from Sealy squarely admitted it, the jury could have found from Ohio's evidence that the purpose of this provision—which did not exist at the time of the Supreme Court's decision—was to prevent aggressive licensees like Ohio from locating plants near the periphery of their APR's, from whence they could compete effectively against neighboring licensees. The evidence also supported the conclusion that Sealy used the clause against Ohio in 1970 and 1973 to achieve exactly that purpose, when Ohio twice sought permission to locate a plant at Toledo, and Sealy twice denied it, at least partly in order to protect the interests of the Detroit licensee.

The degree to which Sealy licensees could effectively compete with each other from their fixed central locations was necessarily reduced by the charges Sealy imposed on out-of-APR sales. Taking the less onerous charge first, Sealy required licensees to pay 1% of out-of-APR sales to cover product service repairs made by "invaded" licensees. Although the original conception of this charge involved its being paid to Sealy to hold in a fund from which to compensate licensees who actually provided such repairs, in execution the charge was paid over to "invaded"

[10]Evidence indicated that the St. Louis market, currently served by the Memphis licensee from a plant in Memphis, is such an instance.

licensees whether or not they ever repaired a single mattress. Ohio's evidence indicated that any such repairs were typically made by the selling licensee, and Sealy's president admitted that quality control on Sealy products was so good there were seldom product service repairs required, and that he saw little legitimate purpose in the 1% charge. The jury could have found it exacted a 1% tax on exercise of the "right" to sell outside a licensee's APR.

Sealy also imposed pass-over payments, supposedly designed to prevent an out-of-territory licensee from taking a "free ride" on an APR licensee's efforts and expenses to develop the Sealy name in its APR. Like the product service repair charge, pass-over payments have a plausible theoretical justification. The jury could nonetheless have found from the evidence that the payments unjustifiably served as a barrier to intrabrand competition. Ohio's economic expert, Dr. Willard F. Mueller of the University of Wisconsin, formerly and for many years the Chief Economist and later the Chief of the Bureau of Economics at the Federal Trade Commission, told the jury that the function of developing consumer preference for Sealy products was almost exclusively performed by Sealy's national advertising program, and that local advertising was designed primarily to increase local sales. A prime example of the type of advertising expense incurred locally was a cooperative advertising program for retailers, who ran local newspaper advertisements to attract customers to a bedding sale, very possibly featuring other brands as well as Sealy products. Even if there were some "free rider" effect from such advertising, the jury could easily have found that compensating an "invaded" licensee to the full proportionate extent of all his advertising and promotion expenses went much further than needed for the limited articulated purpose. The possible dampening effects on competition of pass-over payments that could run as high as 11% must have been obvious to the jury. Dr. Mueller testified that in fact the pass-over payments and the product service repair charges created barriers that made it every difficult to compete effectively

outside the APR. He also testified that the expectation derived from his substantial experience would have been that significant intrabrand competition would have developed after the Supreme Court invalidated Sealy's exclusive territories, but that no significant amount of such competition existed.[11]

As we have indicated, Sealy inserted in its license agreements a provision giving it a right of first refusal before a licensee sold its business. Once again, this is a contract term inoffensive in itself, that the jury, however, could have found to have been used to perpetuate enclaves relatively free from intrabrand competition. Sealy had a right to veto a proposed sale of a licensee's business on objective business grounds, but it never invoked that provision when Ohio sought to acquire another licensee's business, because Ohio is obviously a well-qualified licensee. Instead, although the right of first refusal had never been exercised against anyone else, it was exercised five times against Ohio. In late 1970 and early 1971, Ohio contracted to acquire the Philadelphia licensee. After the neighboring Baltimore licensee (a member of Sealy's Board of Directors, and of the Board's Executive Committee) complained, Sealy exercised its right of first refusal, and the

[11]Indeed, as much as Sealy emphasizes its figures on the amount of sales out-of-APR to show that such sales were in fact quite possible, the figures do not contradict Dr. Mueller's conclusions. Between 1969 and the first six months of 1976, Ohio did make millions of dollars of out-of-APR sales, but the record would amply support the conclusion that Ohio was the kind of licensee that was likely to make the best of even a very restrictive situation. The fact that Ohio overcame the obstacles to some degree in no way proves that it was not significantly impeded in making even more sales in intrabrand competition. Moreover, analysis of out-of-APR sales by licensees other than Ohio is quite telling. Notwithstanding that in at least one extended market area, the densely populated northeast, there are many city markets within less than 200 miles of numerous licensees' plants, less than .0042 of Sealy sales were made in the 1969–1976 period out-of-APR. Although, as Sealy points out, there appears to be a trend to increased amounts of such sales, the pertinent figures for 1974, 1975 and the first six months of 1976 were only less than .009, less than .012, and approximately .007, respectively.

Philadelphia licensee withdrew the business from sale, as was its right. In 1972, the scenario was repeated, but this time Sealy succeeded in acquiring the business. In mid-1970, Ohio sought to acquire the Florida licensee. Sealy announced its intention to exercise its right of first refusal (after complaint by a neighboring licensee director), and the business was withdrawn from sale. In 1972, Ohio again sought the Florida business. Despite feelings that the price was too high, Sealy blocked Ohio's efforts to acquire the Pittsburgh licensee and acquired it for itself. In all three instances, the businesses acquired have lost money since Sealy bought them.

To be sure, Sealy had a more legitimate explanation of its exercises of the right of first refusal. It took the position at trial that the Supreme Court decision spurred bona fide interest in reconstituting Sealy as a national integrated vertical manufacturer/distributor of bedding.[12] (The Court had distinguished *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), where it held that vertically imposed territorial limits were not subject to the *per se* rule, 388 U.S. at 354, 87 S.Ct. 1847; and *see Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), and such limits practiced by a vertically integrated supplier would seem to be an *a fortiori* case if, indeed, the threshold requirement of a combination or conspiracy could somehow be met in such a case.) The short answer to this theory is that Ohio introduced evidence that a desire to stop Ohio from intrabrand competition was the true reason for Sealy's acquisitions, *e. g.*, that influential neighboring

[12]Sealy's position derived some evidentiary support from proof that Sealy explored the possibilities of vertical integration with two different business consulting firms, and that Sealy and a number of its licensees entered a valuation program conducted by one of the consulting firms to appraise the licensees' businesses. Ohio took the position that the program, with its corollary restriction that no participating licensee could sell its business during the course of the valuations, was at least in part a move to limit intrabrand competition by removing licensees from the acquisitions market in which Ohio was interested.

licensees complained, that Sealy paid a price it considered too high for Florida, and that it persisted in acquiring licensees Ohio sought to buy despite the fact Sealy could not operate them profitably. The choice between the conflicting evidence and the differing inferences was for the jury, not for the district court in considering Sealy's motion for judgment n. o. v., and not for us in reading a cold record on appeal.

Sealy advances one additional argument on the issue of a market allocation violation that we believe deserves brief attention. Although Sealy agreed to the district court's *per se* allocation instruction, it argues now that the Rule of Reason was the only possible basis of its liability and that Ohio did not satisfy the rule Sealy says that its acquiescence in the *per se* instruction does not bar this argument because it does not seek reversal on the basis of improper instructions, *see* Fed.R.Civ.P. 51, but rather asserts that under the law truly and properly applicable to the case Ohio's case should never have been submitted to the jury. It insists that this is particularly true where the law has changed after the trial, because an appellate court is bound to render decision on the issues before it on the basis of currently applicable law. As Sealy's argument derives from *Continental T. V., Inc. v. GTE Sylvania, Inc., supra,* decided after final judgment was rendered below, we agree that the argument should be considered, *see Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), but we reject it on the merits.

*Sylvania* overruled *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), and held, as had the *White Motor* case, *supra,* decided only four years before *Schwinn,* that *vertically-imposed* territorial limitations must be judged not by a *per se* rule but by the Rule of Reason. Because the Court in *Sylvania* expressly reaffirmed the appropriateness of the *per se* rule for horizontal territorial limits, 433 U.S. at 58, n.28, 97 S.Ct. 2549, it is difficult to see how the

decision advances Sealy's argument.[13] It insists nonetheless that the very premise of the *Sylvania* decision is that restrictions on intrabrand competition may promote interbrand competition, thus making it impossible to say that such restraints have the requisite "manifestly anticompetitive" nature to justify a *per se* rule of illegality. *Id.* at 50, 97 S.Ct. 2549; and see *Northern Pacific Railway v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). In *United States v. Topco Associates, Inc., supra*, however, the Court rejected exactly this argument in the context of horizontal restraints, 405 U.S. at 610–11, 92 S.Ct. 1126, and the *Sylvania* decision expressly reaffirmed that rejection. 433 U.S. at 57, n.27, 97 S.Ct. 2549. A horizontal agreement among potential competitors to devolop a national brand and not to compete with each other in selling it is, we think, considerably more suspect than limitations imposed by a single independent manufacturer on its distributors as a condition of their distributorships, but even if we were inclined to agree with Sealy's arguments to the contrary, we believe the Supreme Court has foreclosed that approach. Moreover, had we accepted Sealy's argument that only the Rule of Reason could be applied, we would be unable to agree that Ohio failed to make out a jury case under that rule. Dr. Mueller testified, *e. g.*, that the national mattress industry was heavily concentrated and the market was heavily conditioned to acceptance of major brand names, and that, accordingly, an increase in intrabrand competition—in this industry at least—would also promote increased interbrand competition.

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[13]We are aware of no authority interpreting *Sylvania* as having any pertinence to horizontal restraints such as those at bar. *Newberry v. Washington Post Company*, 438 F.Supp. 470, 474 - 5 (D.D.C.1977); *Evanston Motor Company, Inc. v. Mid-Southern Toyota Distributors, Inc.* 436 F.Supp. 1370, 1372–73 (N.D.Ill.1977); and *Pitchford Scientific Instruments Corporation v. Pepi, Inc.*, 435 F.Supp. 685, 688 (W.D.Pa.1977), all recognize the lack of such pertinence, and Sealy has not suggest that there are any cases to the contrary.

We now turn to Sealy's contentions that Ohio demonstrated no antitrust injury and no antitrust damages compensable under Section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." After final judgment herein, the Supreme Court decided *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), an important case in the interpretation of Section 4, and one on which Sealy heavily relies.

In *Brunswick*, a large national producer of bowling equipment had acquired numerous bowling alleys that had defaulted in their debts to the producer. It was conceded before the Court that the acquisitions violated Section 7 of the Clayton Act, 15 U.S.C. § 18, in that they might substantially lessen competition or tend to create a monopoly, and that but for the acquisitions, the alleys would have failed. Plaintiffs were operators of bowling alleys competing with those acquired by Brunswick, which established that they would have gained larger market shares and profits had Brunswick not acquired its alleys and kept them in business. The Court held that plaintiffs were foreclosed as a matter of law from recovering the profits thus lost, despite the causal link between the lost profits and the antitrust violation. More was required, specifically a nexus between the recovery sought and the purposes of the antitrust laws. In *Brunswick*, a Section 7 violation existed only because a "deep pocket" giant was entering a market of "pygmies." 429 U.S. at 487, 97 S.Ct. 690. Yet if the failing alleys had acquired refinancing or been purchased by "shallow pocket" firms, plaintiffs would have suffered the same loss, despite the absence of a Section 7 violation. Similarly, if the alleys had been prosperous, Brunswick's acquisition would have been at least as illegal, yet plaintiffs would have suffered no loss. *Id.* As the Court pointed out, plaintiffs were really seeking damages for loss caused by fair competition, in total perversion of the purposes of the

antitrust laws.[14] As the Court summarized the teachings of its *Brunswick* decision:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

*Id.* at 489, 97 S.Ct. at 697 (emphasis in original). Sealy argues here that Ohio totally fails to meet that standard.

At the outset, we note that Sealy's arguement goes too far. To justify judgment n. o. v. even with respect to the market allocation theory to which the *Brunswick* argument is addressed, Sealy would have to demonstrate that absolutely no antitrust injury was evidenced at trial. That cannot be said here. To take but one example, the jury was entitled to find that pass-over payments and product service repair charges were parts of a plan of market allocation, and Ohio introduced evidence of nearly $170,000 paid to Sealy thereunder. We do not believe an argument can be made that a tax on intrabrand competition is not the type of injury the antitrust laws were intended to prevent or that it does not flow from that which makes a market allocation scheme illegal. Nonetheless, if Sealy is correct that Ohio's lost profit damages resulting from Sealy's acquisition of the Florida, Pittsburgh, and Philadelphia licensees are not compensation for antitrust injury, a new trial would be required because the amount of damages awarded by the jury established as a mathematical certainty that compensation for those lost profits was a part of the jury's verdict.[15]

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[14]The Court emphasized that a very different case would have been presented had plaintiffs shown that Brunswick had abused its deep pocket by engaging in, *e. g.*, predatory conduct injuring plaintiffs, but plaintiffs made out no such case.

[15]As we have noted, Ohio claimed a total of $9,233,563 in damages, of which $6,436,995 represented profits lost by the lost acquisitions. The jury's verdict awarded $6,814,852.

The thrust of Sealy's argument is that the competitive situation would have been the same regardless of whether the prior licensee, Ohio, or Sealy had primary responsibility for the territories in question.[16] It insists that Ohio is merely a disappointed desirous purchaser of the licensees, and that to award damages for the disappointment is a perversion of the antitrust laws. If Ohio had claimed damages here on the theory that, *e. g.*, Sealy's acquisitions in themselves violated Section 7 of the Clayton Act, Sealy's argument might have some plausibility. Sealy ignores, however, the theory Ohio argued to the jury and on which the district court gave instructions, that Sealy's exercise of its right of first refusal was a part of a scheme of market allocation, done to keep Ohio from establishing new bases from which it might effectively compete with neighboring licensees. Evidence indicated that had Ohio acquired the territories, its policy of competing across the borders of its APR's would have produced significant intrabrand competition that did not occur under Sealy's management of the territories. Moreover, there was evidence that within the APR's themselves, Sealy would have been a more efficient producer and more effective interbrand competitor. While Sealy would not

[16]Sealy hypothesizes that if an outside buyer had simply outbid Ohio in its attempts to acquire the licensees, there would have been the same loss to Ohio without any antitrust violation. This argument has the appeal of superficial similarity to an example used by the Court in *Brunswick*. See discussion *supra*. But the point the Court was making there—that there was no nexus between the injury claimed and the purposes of the antitrust laws—simply cannot be made here, for reasons discussed *infra*. The incorrectness of lifting the example from the *Brunswick* opinion and attempting to generalize it without regard to its context can be quickly demonstrated by an example: if General Motors, on its own and for bona fide and unassailable business reasons chose to stop supplying one of its dealers with automobiles, there would be no antitrust violation, yet the loss to the dealer would be identical to that which would result if all the neighboring dealers had pressured GM to cease supply in order to reduce intrabrand competition. We doubt that even Sealy would argue that the loss in the latter instance would not be antitrust injury. *See United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed 2d 415 (1966).

presumably have blocked Ohio's attempted acquisitions for the purpose of limiting effective inside-APR interbrand competition, evidence indicated that a loss of that competition may have been a price Sealy was willing to pay to achieve the primary purpose of maintaining territorial restraint.

There was, in other words, evidence of an illegal scheme to divide markets, intentionally effectuated against Ohio by means of Sealy's acquisitions, resulting in harms both to intrabrand and interbrand competition because Ohio's contracts to acquire the licensees were frustrated.[17] We believe the profits lost thereby do reflect injury of a type the antitrust laws were intended to prevent and do flow directly from the anticompetitive scheme that made Sealy's acquisitions illegal. Obviously, to the degree the profits Ohio would have made might include profits that a poor interbrand competitor committed to avoiding intrabrand competition

[17]Sealy advances the related argument that Ohio's losses were not caused by the right of first refusal or its exercise, but merely by Ohio's decision not to make higher bids than Sealy was willing to match. We wholly disagree. The jury was properly instructed that it would be sufficient to establish causation if the jury found antitrust violations to be material factors in causing loss. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). We note that there was no evidence indicating that Ohio had the power to force a licensee desirous of selling his business to withdraw the business from sale to Sealy once the right of first refusal was exercised. Indeed, the thrust of Sealy's counterclaim, rejected by the jury, was that Ohio committed grievous wrong by the role it may have played in even *encouraging* selling licensees to withdraw their business from sale at the time of Sealy's attempted exercise of the right. Moreover, in both Florida and Philadelphia, Ohio did up the ante significantly only to have Sealy (which had not expressed previous interest in acquiring either licensee) match the higher offer even though at least in the case of Florida, Sealy considered the price paid too high. The jury could surely have found that the market allocation scheme was in fact the cause of Sealy's exercise of the right of first refusal.

could also have made,[18] they do not totally reflect an actual harm to market competition. But as the Court made clear in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961) (per curiam), private antitrust suits need not be premised on actual diminutions in market competition, so long as they involve anticompetitive conduct aimed at the plaintiff. The refinement made in Brunswick is simply that the injury claimed "should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S., at 125, 89 S.Ct. 1562." 429 U.S. at 489, 97 S.Ct. at 697 (footnote omitted). That test is amply met here.

### B. Tying and Price-Fixing of Mattress Components

It is undisputed that Sealy required its licensees to manufacture Sealy products in accordance with certain specifications. The specifications required use in mattress foundations of a torsion bar element called a Posturegrid, which is a patented product of the Universal Wire Spring Company. Sealy also insisted that certain other specified components be purchased from designated approved suppliers. Mattress springs are the component primarily in issue here. Sealy had three subsidiaries that manufactured spring units and that were at all pertinent times approved

[18] We emphasize that it is by no means clear that the profits Ohio would have made in the territories would not have been entirely attributable to increased intrabrand and interbrand competition. Sealy, after all, a demonstrably less effective interbrand competitor which, perhaps understandably, made no significant intrabrand sales in the territories, *lost money* on the territories acquired to block Ohio's expansion. We note here, in passing, that Sealy does not attack the method used by Ohio to estimate its lost profits, applying a representative Ohio-plant profit margin to the sales actually made in the territories after Sealy acquired them. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 116–17, 89 S.Ct. 1562.

suppliers.[19] Evidence established without dispute that Universal Wire and approved spring manufacturers paid to Sealy a charge of from three to five percent of their sales to the licensees, unbeknownst to the licensees. The jury could have found that the charge was in the nature of a payment for the privilege of being a supplier to Sealy licensees, akin to a commission to Sealy for purchases it forced its licensees to make.[20] There was also evidence that prices for Posturegrid assemblies and spring units under this system were significantly higher than for comparable products available in the market. Sealy's chairman, indeed, admitted that something of a "captive market" existed for spring units for Sealy products. Ohio also introduced evidence that during the late 1960's, Sealy's original spring manufacturing subsidiary (in Rensselaer, Indiana) agreed with the only other manufacturer then approved to supply Sealy licensees that the two firms would set the same prices.

We agree with Ohio and the district court that it was proper to send Ohio's components claims to the jury. "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." *Northern Pacific Railway Co. v. United States, supra,* 356 U.S. at 5, 78 S.Ct. at 518. Because they

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[19] Sealy Spring Corporation—Indiana was the only subsidiary in existence throughout the entire damage period, but Sealy Spring Corporation—East and Sealy Spring Corporation—West were approved suppliers from their inception through the end of the period.

[20] Sealy's Vice President at one time wrote a letter to the President of an approved spring supplier, referring to the charge as a royalty for the privilege of supplying Sealy licensees. Although Sealy's trial witnesses attempted to characterize the charge as compensation to Sealy for its quality control inspection program for suppliers, officials of Sealy had prior to 1971 frequently referred to the charge as a royalty, a commission, or a load charge. Sealy also had at one time, extending into the damage period pertinent to this case, received rebates on mattress ticking supplied to licensees, such rebates being justified only by a desire for revenues for Sealy. Sealy does not argue on appeal that the jury was obligated to accept the quality control service charge characterization.

deny competitive access to the tied product market on the basis of the seller's leverage in the tying product market, and force buyers to forego free choice between sellers, such arrangements

> are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of commerce is affected.

*Id.* at 6, 78 S.Ct. at 518 (citations omitted); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498–99, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

Sealy, as we have said, does not dispute that it conditions the license of its trademarks on the licensee's use of specified components from designated suppliers. Nor does it deny that its unique and legally protected trademarks, *see United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 619, 621, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977), which have achieved substantial consumer acceptance, create sufficient power to allow it to restrain competition in the market for the components, or that a substantial volume of commerce is affected.[21] Sealy does argue, nonetheless, that the challenged practices are not of the type properly condemned as tying arrangements.

With reference to the Posturegrid specification, Sealy points out that the Universal product was patented and argues that it was the legal patent monopoly that foreclosed competitors' access to Sealy licensees. This assertion unfortunately misses the thrust of Ohio's claim, that Sealy wrongfully mandated use of the Posturegrid and gained hidden rebates thereby, at the expense of the licensees.[22] We quite agree with Ohio that a patented product, like

[21]Ohio's purchases alone of the allegedly tied components amounted to approximately $9.6 million during the pertinent period, and the entire Sealy organization obviously purchased many times this amount.

[22]Ohio introduced evidence that it would have purchased comparable items elsewhere (given the premium price Universal was charging) but for the mandatory specification.

any other, may be illegally tied. "The antitrust laws do not permit a compounding of the statutorily conferred monopoly." *United States v. Lowe's, Inc.*, 371 U.S. 38, 52, 83 S.Ct. 97, 105, 9 L.Ed.2d 11 (1962).

Sealy also insists that the vice condemned in the tying cases simply cannot be found where a trademark licensor specifies the patented products of a third company for use by its licensees, because the licensor, whatever the power conferred by his trademark's value, cannot be said to be using it to invade a second market. We agree that there is no illegal tying arrangement where a "tying" company has absolutely no financial interest in the sales of a third company whose products are favored by the tie-in. *Crawford Transport Company v. Chrysler Corporation*, 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 954, 85 S.Ct. 1088, 13 L.Ed.2d 971 (1965); *Keener v. Sizzler Family Steak Houses*, 1977-2 Trade Cases ¶ 61,682 at 72,800 (N.D. Tex.1977); *Rodrigue v. Chrysler Corporation*, 421 F.Supp. 903 (E.D. La.1976). Here, however, it is undisputed that Sealy received substantial rebates from Universal on sales to the licensees, and, moreover, that those rebates were concealed from the licensees. The concealment aspect alone might have justified a jury's decision to disbelieve Sealy's claim that the payments made to Sealy were not in return for the specification of Universal's product as mandatory Sealy components. In addition, the asserted justification for the payments was that they were compensation for Sealy's technical efforts in helping Universal adapt its torsion bar concept to the mattress industry. Yet Sealy's President admitted that Universal had prior to dealing with Sealy applied the concept to the mattress industry (though an improvement was still needed at the time), and, as was brought out at trial, the written agreement between Sealy and Universal made no reference to Sealy's provision of technical assistance, though it did state that Universal was to provide technical assistance to Sealy. Sealy's third argument on the Posturegrid units, that the specification

was not shown to be other than a bona fide decision on the basis of product merit by a trademark owner to protect the essential characteristics of the trademarked product, may be disposed of briefly. The jury could have found from the evidence we have discussed that Sealy forced the use of the Posturegrid and was paid handsomely by Universal simply for creating a captive market in which it could and did charge a premium price. Even if the Posturegrid was a superior product, such an arrangement was unlawful. *See Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961), a case very similar to this one.

Regarding mattress spring units. Sealy takes the position that an essential element of a tying case is proof of actual foreclosure of competition. It cites *Fortner Enterprises, Inc. v. United States Steel Corp.*, 523 F.2d 961, 967 (6th Cir. 1975), *rev'd, United States Steel Corp. v. Fortner Enterprises, Inc., supra; Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir.), *cert. denied*, 419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296 (1974); and *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974), to support this proposition, and says that Ohio has failed to introduce the requisite proof. Because the Supreme Court has repeatedly held that tying, if it fits within the *Northern Pacific* standard, is a *per se* violation, we are not free to inquire whether such tying in any given case injures market competition. Sealy's argument, however, is somewhat more subtle than that, and we agree that if a given tying arrangement has no potential to foreclose access to the tied product market, it does not exemplify the vice that led the Court to declare tying a *per se* offense. *Coniglio* and *Driskill* amply illustrate the proper bounds of the actual foreclosure rule.[23] In these cases, the practices of two National Football League clubs of requiring season ticket buyers to purchase

[23] The Sixth Circuit's *Fortner* opinion cited *Coniglio* and *Driskill* as recognizing an actual foreclosure requirement, but declined to apply it as a bar to the case before it.

preseason exhibition game tickets in the same package were attacked as illegal tie-ins. Because both clubs had a complete monopoly, however, in the tied as well as the tying market, *there could be no foreclosure* of competitive access to the tied market resulting from the tie-in. If the same thing could be said here, Sealy would have been entitled to a directed verdict on mattress spring tying.[24]

We think there was clearly a jury question on foreclosure during the pertinent period, however. Only approved manufacturers could supply Sealy licensees. Sealy's own subsidiaries were always approved. Prior to 1972 (when Sealy obtained patents on the then-specified spring units) only two other firms were approved, the Steadley Company from which Ohio purchased and a west coast firm referred to as Laisco. Both firms paid, as the jury could have found, a commission to Sealy for the privilege of supplying Sealy licensees. *See Osborn, supra.* The Steadley Company was induced to agree to base its prices for specified units on those charged by Sealy's manufacturing subsidiary.[25] The jury was entitled to infer that no firm which would not play the game by these rules would win Sealy's approval as a supplier. In this context, Sealy's statement that there was no evidence it ever denied supplier approval carries much less weight than might otherwise be

[24] Because the jury may have awarded some damages flowing from the tie-in, Sealy, under *Coniglio* and *Driskill*, would be entitled either to a new trial, or to a remittance of the full amount of damages claimed from tying to eliminate the possibility it was prejudiced by submitting the claim to the jury. See *Durant v. Surety Homes Corporation*, No. 77-2045, 582 F.2d 1081 (7th Cir. August 8, 1978). The possibility also exists that the district court's remittitur of half of the jury verdict, if erroneously offered as an alternative to a new trial, would render harmless the submission of the tying theory to the jury. See discussion *infra*.

[25] Sealy's attack on the sufficiency of the evidence to prove this point is without merit. Evidence indicated not only identity of actual prices charged but also an express agreement to fix prices. That Sealy's officials denied the agreement, or that Ohio could not prove the agreement continued to any definite ending date, would not have justified taking the question from the jury.

the case. Moreover, the jury could have concluded Sealy attempted to force Steadley and Laisco out of the suppliers' market. In 1970, Sealy developed new specifications which it thought patentable, and applied for a patent thereon. Although Sealy now cites its licensing of a supplier under the patent, after it issued in 1972, as evidence of its magnanimity and of lack of foreclosure, Sealy advised both Steadley and Laisco in 1970 that if a patent issued no one would be licensed thereunder. Thus even if Steadley withdrew from supplying Sealy springs in late 1970 because of a lack of desire to incur tooling costs that would not be recoverable over a reasonable amortization period if the patent issued, the jury could have concluded that Sealy used the no-license threat to drive Steadley out of the market during the interim period. (When Steadley did withdraw, only Sealy's subsidiary was left in the captor selling market created by the specifications.) Furthermore, Steadley asked for the specifications for the new system so that it could tool up to produce the new springs, or at least consider doing so, and Sealy refused to provide them. Thus it is not even clear Steadley would not have been willing to be a supplier in the interim period. There was also evidence to support the conclusion that Sealy used its quality control inspection and approval powers to force Steadley out of the market. Sealy's President at one point in 1970 wrote to its Vice President suggesting that Sealy ought to consider continuing to allow Steadley to manufacture approved products (despite alleged quality control problems) as a bargaining tool to avoid problems from Steadley regarding the proposed change of specifications that would put Steadley out of the business of supplying Sealy licensees.[26]

C. The National Accounts Agreement

To deal with potential customers such as Montgomery Ward & Co., Sears, Roebuck & Co., and J.C. Penney Co., which

[26] Sealy's attack on the sufficiency of the evidence to make a jury question of Ohio's theory of monopolization of Posturepedic springs is based entirely on the no-foreclosure argument which we have rejected. Accordingly, we reject the argument in this context as well.

sell bedding at many retail outlets throughout the country, Sealy developed its national accounts program,[27] which was originally embodied in a separate agreement but which is now a part of Sealy's license agreements. Under this program, Sealy approached the national accounts directly and attempted to negotiate agreement to supply both Sealy-brand products and private label products according to agreed specifications and at agreed prices. Once agreement was reached, each Sealy licensee was given the opportunity to participate in the program for the particular national account involved. Participation, we emphasize, was wholly voluntary. Any licensee was free not to participate, and to negotiate directly with the customer in an attempt to supply all or any part of the customer's needs. (Sealy has not had exclusive dealing contracts with any national account.) Even though a licensee might originally elect to participate, it was perfectly at liberty at any time to withdraw from the program and to begin negotiations with the customer.[28] While a licensee was in the program, however, it was obliged to supply the customer's outlets in its APR with the specified products at the agreed price. The customer was not prevented from specifying that it wanted deliveries to any given outlet made by a licensee which did not have primary responsibility for the territory in which the outlet was located. This in fact did occur from time to time.

Sealy's primary national account was Montgomery Ward & Co. (Ward's). The furniture merchandise manager for Ward's testified that his company had committed itself to a policy of purchasing from firms that could serve Ward's needs nationally, because of the efficiency, simplicity, and flexibility available in

[27]It is a matter of some historical irony, if no great substantive significance, that the program was devised by a committee chaired by E.M. Wuliger, the President of Ohio.

[28]The sole limitation on the right to withdraw was that a licensee was obliged to fill orders under the program for a six month transition period. No claim is made that this provision is illegal.

dealing with a single source of supply.[29] He also testified that if Sealy eliminated the national accounts program, Ward's would turn to other national suppliers to meet its needs and would not return to its earlier "chaotic" practice of purchasing from many manufacturers. This testimony was undisputed. Sealy officials testified that the existence of such attitudes among national account customers was the reason for the program Ohio attacks, and this testimony also was never seriously challenged.

Ohio participated in the national accounts program until 1974, at which time it withdrew. Since that time, Ohio has vigorously sought to capture a significant part of Ward's business, offering lower prices than those provided by the Sealy-Ward's contract. As we have noted, Ohio is an efficient high quality manufacturer. Nonetheless, Ohio has not been successful in garnering Ward's business, because of Ward's preference for dealing with a national supplier. Asserting the illegality of the national accounts program, Ohio sought $106,766 in damages for sales it alleged it would have made to Ward's (and to J.C. Penney, in a much smaller amount) but for the program.[30]

We have concluded that the district court should have directed a verdict in Sealy's favor on this claim. First, as Sealy points out,

[29]Ohio repeatedly emphasizes that Ward's does not in fact deal with a single supplier of mattresses. It is true that Ward's has separate national suppliers of foam and innerspring mattresses, and that in a few isolated instances Ward's is obliged by circumstances to meet its needs locally. There is even one market area where Ward's agreed, in response to appeals from community leaders, to purchase mattresses from a local firm as part of a program to shore up the depressed economy in the market area. The essential fact, however, stands undisputed in the record: Ward's does have a policy of buying from a single source of supply, albeit that policy is subject to rare exceptions.

[30]Ohio also claimed $294,915 in damages for royalties paid to Sealy for goods not bearing Sealy-brand labels. Over 97% of these royalties derived from sales to Ward's while Ohio was in the national accounts program, but the rationale for these damages is analytically distinct and we consider this claim hereinafter.

the profits lost from sales to Ward's resulted from Ohio's purely voluntary choice to compete for the business on its own, not from any illegality that arguably might have infected the national accounts program. Both causation and *Brunswick, supra*, problems pose insurmountable obstacles to the recovery sought.

Second, and more fundamentally, we are unable to perceive how a jury could have found the national accounts program to be illegal. It is clear that a joint selling agency is not *per se* violative of the antitrust laws. In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933), the Supreme Court applied the Rule of Reason to, and ultimately approved, an arrangement by which 12% of the coal suppliers in a given region sold all their coal to all buyers through a joint agent. The Court did so notwithstanding a finding, which it did not overturn, that prices for coal would rise as a result of the arrangement, because the economic circumstances extant made the arrangement reasonable, and demonstrated that real competition would continue to exist in the market. The case before us would appear to follow a *fortiori* from *Appalachian Coals*. Here the joint sales agreement applies only to a limited type of customer, no licensee is foreclosed from competing for the business independently, and there is absolutely no basis in the record for assuming that a powerful national purchaser like Ward's is foolishly suffering a higher price from the program than it could at any time obtain from other national suppliers that no doubt would be pleased to have the business. Sealy's success with Ward's, in fact, appears to reflect an increase in interbrand competition with no diminution of intrabrand competition, because Sealy licensees could not have competed effectively for the business without combining to offer a single source of supply. In *2361 State Corporation v. Sealy, Inc.*, 402 F.2d 370, 374 (7th Cir. 1968), this court had occasion to consider Sealy's national accounts program. We indicated at that time that the Rule of Reason ought to be applied to the program, but held that Sealy had not met the strict requirements to justify

summary judgment under the rule. See *Poller v. Columbia Broadcasting System, Inc., supra*, 368 U.S. at 473, 82 S.Ct. 486. Ohio has had its day in court to attack the program—it has had, in fact, four months in court—but it has failed to demonstrate the anticompetitive vice inhering in it.

It will not do to lump the program indiscriminately in with the proven elements of Ohio's territorial allocation case, as Ohio invites us to do. Although most sales are assigned to licensees on the basis of APR's, this is not invariably the case, and, more importantly, no licensee is restrained *by the program* from competing in any territory for the business of national account customers. Nor does Ohio's assertion that it has proved a resale price maintenance agreement between Sealy and Ward's advance its argument. If such an agreement were found, the antitrust laws would surely provide a remedy, by way of trebled damages caused thereby (which Ohio did not claim to suffer) or an injunction, sought by one injured by the agreement (which Ohio did not claim to have been) or the United States. But the existence of the *agreement*, which we assume *arguendo*, really says nothing about the reasonableness of the *program*, which is a separate practice in a separate market.

Ohio also claimed damages of nearly $30[illegible],000 in royalties paid to Sealy on Ohio's sales of non-Sealy label goods. The license agreement called for royalties on such sales (in lower amount, naturally, than for Sealy products), and Ohio attacks this provision of the agreement. Because nearly all the sales in question were made to Ward's, the parties treat this claim as part of the national accounts element of Ohio's case, but the rationale of liability is quite distinct: Ohio says that to require the payment of royalties on products not sold under Sealy's trademark is a *per se* violation of the antitrust laws, citing *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 135–36, 89 S.Ct. 1562. *Zenith*, however, does not stand for the propositions for

which Ohio's claim requires its support. First, the Court did find patent misuse in that case, but it expressly stated that

> it does not necessarily follow that the misuse embodies the ingredients of a violation of either § 1 or § 2 of the Sherman Act. . . .

*Id.* at 140, 89 S.Ct. at 1585. Second, the misuse involved was the *conditioning* of a patent license on the licensee's agreement to pay royalties on products both using and not using the teachings of the patent. The Court expressly reaffirmed the rule of *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed 1312 (1950), that a patent owner could negotiate for royalties on total sales (whether or not all sales used the patent) as a convenient measure of the value of the license. It was simply the refusal to license on any other terms that constituted the misuse, and the Court pointed out that no inference of such conditioning could properly be made simply because a license provision called for royalties on total sales. 395 U.S. at 138, 89 S.Ct. 1562.

Even if the leverage allegedly used by Sealy to obtain non-Sealy product royalties were the bare grant of the right to use a patented product, Ohio's claim would fail for the lack of a showing of conditioning. Although the letter accompanying Sealy's post-*United States v. Sealy* decree proposed license agreement indicated that the failure to accept the agreement would lead to license termination, extensive negotiations were in fact had over agreement provisions, and Ohio was able to obtain revisions in the proposed agreement. There was no evidence that Ohio sought to eliminate the non-Sealy royalties, which no doubt would have resulted in a higher royalty on the Sealy-brand products. Moreover, Sealy obtained royalties not merely for the bare license of its trademark, but also for significant advertising, technical, and other services. To argue that none of the services provided in the package could have benefited the licensed plants other than in the

production and sale of Sealy-brand products is to far outrun the facts in the record. It is significant, also, to recall that over 97% of the royalties Ohio paid were for sales to Ward's. Without the organizational and management services of Sealy, and the specifications developed between Ward's and Sealy, such sales would never have been made, as Ohio's experience since withdrawing from the national accounts program so amply demonstrates.

Our analysis in this section of the opinion leads to the conclusion that the jury was permitted to consider awarding $401,681 in damages for practices of Sealy that did not violate the antitrust laws. That error obviously does not entitle Sealy to a judgment n. o. v. on all of Ohio's case. Because we cannot know that the jury did not award the full amount claimed on these theories, that amount would have to be deducted from the amount of the verdict to insure the lack of prejudice to Sealy. The consequences of our conclusion here on the judgment appealed cannot be determined, however, just yet. In Section II of this opinion, we consider the attacks made on the district court's decision to condition the denial of Sealy's new trial motion on a 50% remittitur. If the district court was right, an additional remittitur offer of $401,681 (trebled) would cure the error we have found. If Sealy is right that prejudicial errors existed that remittitur could not cure, our remarks on national accounts and non-Sealy royalties will become only guidance for the future conduct of the litigation. And if there did not exist prejudicial errors sufficient to mandate new trial or justify the remittitur, then the accepted remittitur would render totally harmless the submission of these theories to the jury.

II. *Prejudicial Misconduct, Remittitur, and New Trial*

As we have stated, the district court denied Sealy's motion for a new trial conditionally on Ohio's accepting a 50% remittitur, which it did. The court rejected Sealy's claims that references

to *Sealy Mattress Co. of Southern California v. Sealy, Inc., supra,* 346 F. Supp. 353,[31] and *United States v. Sealy, supra,*[32] created improper prejudice, but ruled that trial misconduct by Ohio's counsel had led the jury to award excessive damages for which the remittitur was suggested as a cure. Sealy argues here that the court's findings of trail misconduct amounting to

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[31]The district court judge decided that a danger existed that the jury might have realized that the cited case, *see* n.7 *supra,* was tried by him and resolved adversely to Sealy. The court concluded, however, that the error, if it existed, was harmless. We think it doubtful from our review of the record that the jury would have made the connection between the California licensee's case and the presiding judge here, or that it would have inferred that the court had found Sealy at that time to be violating the antitrust laws (the case involved only the licensee's claim that its license contract was not nullified by the *United States v. Sealy* decree) even if it had realized the identity of the judge deciding the case. We do agree, however, that any error involved was harmless. Sealy does not attack this conclusion.

[32]Sealy argues that *United States v. Sealy* should have been kept out of the trial and that at least an exhibit pertinent thereto that was sent to the jury room mandated a new trial. We agree with Sealy and the district court that *Sealy* could not form the basis of a collateral estoppel on liability herein, but think it clear from the facts of this case that *Sealy* was very much a relevant and proper part of the background of this litigation. The exhibit in issue here contained Judge Austin's findings and conclusions in *Sealy* both before and after the Supreme Court opinion, and short precis (approved by the district court herein) of the latter opinion. We agree with the district court and the parties that it would have been better if the jury had not been given Judge Austin's opinions. (These were apparently left in the exhibit transmitted to the jury accidentally.) We are unable, however, to find any real possibility of prejudice resulting from the transmittal. The exhibit was one of *many* exhibits sent to the jury. The fact that Sealy had engaged in market allocation was properly known to the jury without the exhibit, and the jury was correctly instructed that if it found Sealy to have continued the practice, it should find a *per se* violation. As to Judge Austin's findings that Sealy had also engaged in illegal resale price maintenance, we agree that those facts were of little if any relevance to this case, but Sealy's own witness, on direct examination, has testified to the prior practice and its illegality.

prejudice required the court to grant a new trial, because the prejudice could not be said to have been confined to the damage award. Ohio denies that there was prejudicial misconduct, but insists that the district court acted properly to cure it if there was.

We must confess to having some difficulty understanding how prejudicial misconduct could be said with certainty to have affected the jury's decision only as to damages. *See Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin,* 283 U.S. 520, 521–22, 51 S.Ct. 501, 75 L.Ed. 1243 (1931). We do not decide the question here, however, because we have reached the conclusion that the district court committed clear error in ruling that prejudicial misconduct existed. As we have indicated, Ohio denied the existence of prejudicial misconduct in its brief, although its primary contention on this issue was that the district court's resolution of any problem that may have existed was adequate. At oral argument, Ohio renewed its denial of prejudice, asking that this court, if it should be inclined to accept Sealy's challenge to the cure of remittitur, satisfy itself that the district court was correct in finding prejudice. Any hesitancy we might have had in addressing an issue not fully discussed in the briefs on appeal is more than alleviated by the voluminous post-trial briefs filed in the district court, which we have considered along with the record in the case.

We think it clear that Ohio is entitled to make this argument, despite Sealy's protestations. It is quite true that a plaintiff who accepts a remittitur may not appeal from the district court order proposing it as an alternative to a new trial. *Donovan v. Penn Shipping Co., Inc.,* 429 U.S. 648, 650, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977). The *Donovan* principle also forecloses Ohio from seeking reinstatement of the 50% remitted now that Sealy attacks the remittitur on appeal. As this court held in the recent case of *Durant v. Surety Homes Corporation,* No. 77–2045, 582 F.2d 1081, 1085 (7th Cir. August 8, 1978), however:

> On the other hand, a prevailing party may quite properly defend his judgment on any ground supported by the record. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). For the limited purpose of defending the remitted judgment they have accepted, we believe the Durants are entitled to argue that the district court erred in conditioning the denial of Surety's new trial motion on the acceptance of a remittitur.

Sealy's post-trial motion listed no less than 86 instances of alleged prejudicial misconduct by Ohio's trial counsel. We have no intention of further extending the length of this opinion by repeating the list and setting the context of each incident. A general summary will suffice. At various times, counsel stated that Sealy was attempting to get favorable testimony before the jury while precluding Ohio from developing the whole story pertinent thereto, referring, *e. g.*, to the California licensee's lawsuit referred to above, notes 7 & 31, which was true even though scarcely graciously put. Counsel frequently disparaged Sealy's witness by insinuations in questions, or by stating in response to objections, that the witnesses were unresponsive, that they "remembered" details much better when Sealy's counsel sought testimony from them than when the witnesses were pressed on cross- or adverse examination, that various business reasons for Sealy practices put forward by its witnesses were not true reasons, that a witness lacked knowledge of the subject matter of his testimony, and that witnesses were testifying inconsistently. One of the most extreme instances of this type of conduct occurred in response to an objection to counsel's taking so long to cross-examine a Sealy witness, when counsel replied, "It is a lot harder to crack a phony story, than to tell it in the first place, Judge." Counsel also made numerous statements along the lines that Sealy's counsel was engaged in improperly "testifying" in his role as counsel, was improperly arguing to the jury during the taking of testimony, and had made repeated factual errors. Other comments were made between counsel (and definitely not just by Ohio's counsel) that can only be characterized as either harmless badinage or occasionally

angry exclamations of no particular consequence, a number of which appear on Sealy's list. Counsel also engaged in several argumentative ejaculations that clearly ought not to have been made, two of the most serious of which were "Let's ask the price fixer the question" and "If the Sealy organization is in favor of it, it is most probably illegal."

We have carefully examined the pertinent portions of the record, and can sum up part of our reactions by saying that some of the items on Sealy's laundry list were quite arguably unobjectionable, others were objectionable, if at all, only on the basis of their tone, and others were no doubt improper behavior. The decision as to whether those items which were improper produced prejudice denying Sealy a fair trial, however, cannot be made without examining the general context of the trial to determine the possible impact. *See* 6A Moore's Federal Practice ¶ 59.05[3] at 59–54 (1974).

This was a long jury trial of a complex antitrust case. While the challenges and subtleties of antitrust law often hold a strong fascination for lawyers, a trial such as this one could hardly be expected to keep the average lay juror on the edge of his or her seat for twelve weeks. Recognizing this, in fact, the district court and the attorneys for the parties engaged in a running facetious colloquy throughout the trial, the point of which was that jurors might tend to doze off as a trial day wore on, and that by three o'clock some sparks set flying by counsel could be just the thing to regain the jury's full attention. The court often would advise counsel after a verbal skirmish over some objection or other that "we needed that." The court repeatedly expressed its view, informed by observation of the jury, that the jurors seemed to like both lead counsel and their different styles, that the attorneys had done a fine job of livening up a potentially deadening case, that the jury would be able to sort out the evidence from the personalities when they deliberated, and that the court could perceive no real possibilities of prejudice to either party. This is not to say that

the court refused to intervene when it perceived counsel approaching the line of possible prejudice. Numerous objections were properly sustained, and the jury was repeatedly admonished that the exchanges of the lawyers were not evidence and were not to be considered in deciding the case. *Compare New York Central Railroad Company v. Johnson,* 279 U.S. 310, 318, 49 S.Ct. 300, 73 L.Ed. 706 (1929); *with Koufakis v. Carvel,* 425 F.2d 892, 901, 903 (2d Cir. 1970), on which Sealy heavily relied in its post-trial briefs in the district court. We surely would not bind Sealy thereby, but it is interesting to note that at a point in the trial when nearly half of the cited seriously prejudicial incidents had occurred, Sealy's lead counsel told the court:

> I will say this, your Honor, and it may prejudice me if I should ever find myself in a position where I have to appeal here, but I will say it nevertheless. I think you have done a great job of giving the parties just as fair a trial as a judge could ever do.

It also is worth pointing out that although it would not be fair to characterize all (or nearly all) of Ohio's counsel's alleged misconduct as responsive to arguable improprieties by Sealy's counsel, numerous instances can be so described, see *Stanczak v. Pennsylvania R. Co.,* 174 F.2d 43, 48 (7th Cir. 1949), and it can certainly be said that Sealy's counsel strayed from the straight and narrow on more than a few occasions. Counsel for both sides definitely contributed to keeping the jury awake.

At one point relatively late in the trial, the court commended the attorneys as follows:

> The Court: Gentlemen, I am real proud of you. You are doing so much better than I expected. I approached this case with great fear and concern.
>
> Mr. Hastings: You thought there were going to be fisticuffs?
>
> The Court: Yes, yes.

In the month of trial that followed, involving nearly 2400 pages of transcript, only seven additional incidents occurred which Sealy even bothered to include in its list of 86 prejudicial occurrences. All were minor in nature.

While we do not condone conduct by counsel not designed to advance his case by properly established procedures, we are also not unmindful that in the heat of advocacy, conduct and words which are exchanged and which when viewed on the cold record appear to be on the unseemly side may very well not be so regarded that way at all by the jury, particularly when they occur in the give and take of a hotly contested and extended lawsuit. "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are." *Smith v. Philadelphia Transp. Co.*, 173 F.2d 721, 726 (3d Cir. 1949). If the jury were to be prejudiced by such activity it would be just as likely that it would be directed toward the offender. Ultimately we think the common sense of a jury will prevail in most instances and we are not concerned on the present record that that is not the situation.

When the jury returned its $6.8 million verdict, the district court queried the attorneys whether he had discretion not to treble the damage award. The court was advised that Congress had left no discretion on that point, and, as the court later stated in arguments on post-trial motions, it was very surprised at that result. During those arguments, Sealy's counsel told the court that a judgment in excess of $20 million would wipe out Sealy's net worth and require giving the whole business to Ohio. These factors clearly influenced the court. As it stated in its ruling on the new trial motion:

> The size of the jury's verdict was shocking. At the time it was returned I considered it shocking and asked "How did it happen[?]"

After reflection on Sealy's 86 instances of alleged misconduct, the court decided that those instances must have produced prejudice

in the jury room, notwithstanding that, as we have noted, the court had consistently throughout the trial in the context in which the instances occurred and with the benefit of observation of the jury, expressed its view that no prejudice had been created.

We have concluded that the district court erred in the decisional result of the search on which it embarked for causative error. In the first place, we cannot read the court's decision as an exercise of its discretion to weigh the evidence and to find a damage award not fairly supported thereby, for beyond passing comments that some of the damages claimed tended to the speculative, the court engaged in no weighing of the evidence. Indeed, the court's shock at the size of the full judgment appears to have derived as much from its recognition that trebling was mandatory as from any concern that the facts did not support the award. There was in fact competent evidence that could have supported a verdict substantially higher than that returned. That the jury returned an award lower in amount that the evidence, if believed, could warrant may itself be an indication of a lack of jury passion and prejudice. See *Stanczak, supra* at 48; *Cf. Koufakis, supra* at 901; *Missouri-K.-T. R. Co. of Texas v. Ridgway*, 191 F 2d 363, 368-69 (8th Cir. 1951). Moreover, it was plainly the jury's task to decide whether or to what degree to believe Ohio's damages evidence. It was properly instructed on proximate cause, and that it should only award damages capable of reasonable ascertainment and must not speculate or guess. We note in this regard that Sealy's attacks on Ohio's damages evidence during the trial may fairly be described as mild, and it did not even go into the issue on final argument. Recognizing that "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 123, 89 S.Ct. at 1576, we think the Court's conclusion in *Eastman Kodak Company of New York v. Southern Photo Materials Company*, 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927), applies equally here:

> [P]laintiff's evidence as to the amount of damages, . . . was competent; . . . it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed . . . that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And *the question as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive.* [Emphasis added.]

*Accord, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Fontana Aviation, Inc. v. Beech Aircraft Corporation, supra*, 432 F.2d at 1085-86. Accordingly, we are of the opinion that the district court was mistaken in taking the size of the jury's award as a demonstration that there must have been prejudice created somewhere.

Also, as we have suggested, we have reached the firm conviction that the court erred in finding that there was in fact such prejudice. It should go without saying that we are reluctant to overturn the finding of the district court on such a matter, as we do not have the benefit of having observed the trial and felt its pulse. On the other hand, the considerable deference usually to be accorded to a district court's evaluation of the effect of misconduct is necessarily reduced in this case, where the court, while observing the trial and perceiving its tone, consistently stated in definite terms its confidence that no prejudice was extant, and only a year later in ruling on post-trial motions, did the court reverse its view. It is axiomatic that litigation parties are entitled only to a fair trial, not to a perfect one. Our thorough and independent review of the record has convinced us that the district court was right the first time, that it did a commendable job of ensuring that the parties received a fair trial, and that it committed error in applying hindsight to a trial that was by no means perfect but that was free from prejudicial error.

Accordingly, in view of the fact that the jury verdict was unnecessarily halved, Sealy was, to say the least, not prejudiced by the district court's disposition of its new trial motion.[35] The remitted damage judgment in Ohio's favor is affirmed.

III. *The District Court's Denial of Equitable Relief*

After disposing of the post-trial motions, the district court took additional evidence in hearings on equitable relief and ultimately decided, notwithstanding the jury's determination that Sealy had violated the antitrust laws, that Ohio was entitled to no equitable relief whatsoever. The legal principles applicable to Ohio's appeal from that denial are straightforward and undisputed. Relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, "invokes traditional principles of equity . . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 130, 89 S.Ct. 1562. Accordingly, a district court might properly find violations of the Sherman Act and yet upon application of the traditional equity principles determine that injunctive relief was not appropriate. On the other hand, injunctive relief under Section 16 is

> characteristically available even though the plaintiff has not yet suffered actual injury, . . . he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue to recur.

*Id.*

Where both legal and equitable relief are sought by a plaintiff, the Seventh Amendment right to a jury trial requires that the legal claims be tried first, to a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). This court's decision in *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association*, 371 F.2d

[35] It follows from our conclusion here that submitting the national accounts program and non-Sealy royalty damages to the jury was only harmless error.

263, 270-71 (7th Cir.), *cert. denied*, 387 U.S. 909, 87 S.Ct. 1686, 18 L.Ed.2d 627 (1967), provides a useful summary of the implications of a jury's antitrust verdict for a district court's subsequent ruling on equitable relief. Any actual issues necessarily and actually decided by the jury are foreclosed under settled principles of collateral estoppel from subsequent reconsideration by the district court. The court may not make findings "contrary to or inconsistent with the jury's resolution . . . of that same issue as implicitly reflected in its general verdict . . . on the damages claim." *Id.* at 271.

In this case, the jury returned a general verdict, and we agree with Sealy that given the complexity of the issues before the jury, the verdict by itself and out of the context of the trial could not necessarily be said to have foreclosed any particular issue. See *Russell v. Place*, 94 U.S. 606, 608-09, 24 L.Ed. 214 (1877); 1B Moore's Federal Practice ¶ 0.443[4] (1974). The amount of the verdict, however, makes it a mathematical certainty that the jury found at least one of Sealy's first-refusal acquisitions, discussed *supra*, to have violated the antitrust laws. The jury was not instructed that it could not find the use of a right of first refusal to constitute a violation unless it also found that the right was used as part of an unlawful scheme. The only unlawful scheme of which the acquisitions could have been part was, as Ohio maintained at trial, market allocation. The court's instructions, indeed, discussed the acquisitions as part of the instructions on allocation. We think the court erred, thus, in premising its equitable relief decision on the assumption that the only fact established by the jury verdict was that at least one acquisition somehow violated the antitrust laws. Under the evidence and the instructions, and as the case was argued, the jury verdict must also be read to include a finding that Sealy was engaged in a scheme of market allocation in which one or more acquisitions were at least a part.

The district court should have approached the requested equitable relief in the light of this established fact, but it did not do so.

We think the court should have another opportunity to consider equitable relief on market allocation in this light, and with the benefit of the law applicable to this case as we have discussed it in part I of this opinion. We do not mean to say by any means that the court must find any particular practice attacked by Ohio to violate the antitrust laws. It should consider the evidence adduced both at the jury trial and at the equitable relief hearing, and will be free to make findings not inconsistent with the jury verdict. If the court should find, however, that practices we have said might properly be found to be components of an illegal market allocation scheme were not such, it should explain its analysis in greater detail than it no doubt thought necessary to do in rendering decision on the assumption that the existence of market allocation was open to question. The court should also bear in mind that once a violation is established, as at least one is here, the court may properly enjoin the defendant from "other related unlawful acts." *Zenith, supra,* 395 U.S. at 133, 89 S.Ct. 1562. This practice serves the public interest by "effectively pry[ing] open to competition a market that has been closed by defendant's illegal restraints." *Id.*[11]

With reference to Ohio's mattress components claims, we agree with the district court that the jury's verdict does not necessarily establish a violation here. We do believe the court should reconsider its decision as to past components violations in the light of part I-B of this opinion, and should explain its reasons for finding no past violations, if it should continue to adhere to that view. Sealy argues on appeal that evidence introduced at the equity hearing established that Sealy has modified its practices so as

[11]We express no view on the propriety of Ohio's request that the court order Sealy to divest the acquired licensees to Ohio, other than to say that the court should consider this issue along with all others in deciding what total mix of equitable relief, if any, might be just in the circumstances, and to state that such relief would not be foreclosed simply by Ohio's having received damages for past lost profits on this theory. Obviously, in any event Ohio would not be allowed to receive the licensees without payment therefor.

to eliminate all possibility of injury to licensees like Ohio. The district court on remand will, of course, be free to find that this is true, but it has not yet done so and it is not for us to make findings based, ultimately, on the credibility of witnesses we have never seen.

On remand the district court may, of course, take any additional evidence or argument it might find helpful. Circuit Rule 18 will not apply, however. We have full confidence that the district court judge will approach the equitable relief problems afresh, with the benefit of the views expressed herein, and that the interests of efficient judicial administration will unquestionably be well served by leaving the case with the judge who has already become expert in its many intricacies.

IV. *Post-Judgment Interest*

On April 3, 1975, judgment on the jury's general verdict was filed with the Clerk of the District Court and entered in the civil docket. The prompt entry of the judgment rendered it effective under Rule 58, Fed.R.Civ.P., and comported with that rule's mandatory language that "upon a general verdict of a jury, . . . the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court . . . ." In fact, entry of the judgment followed a brief proceeding before the district court in which Sealy's counsel agreed with counsel for Ohio that prompt entry was "automatic."

Under 28 U.S.C. § 1961,

> [i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

To avoid the interest accruing on the $10,222,278 to which Ohio had agreed to remit its judgment, Sealy thereafter argued to the district court successfully, that Ohio should be awarded interest

only from the date of the final judgment in which the court denied equitable relief and wrapped up the case, January 18, 1977. The court ordered, accordingly, that Ohio was to be deprived of interest on its entered damages judgment during the more than twenty months preceding the court's resolution of remaining issues in the case. We disagree.

To begin with, the language of Rule 58 read with § 1961 seems perfectly clear. Judgment is to be entered promptly, and interest runs from the date of entry. To persuade us that this language does not mean what it says, Sealy advances two arguments, neither of which, in our opinion has merit.

First, it says that prior to January 18, 1977, absent an order of court pursuant to Rule 54(b), Fed.R.Civ.P., there could be no final judgment on which interest could run. The initial difficulty with this argument is that § 1961 does not in terms require that a judgment be final in the sense of tying up all the issues in a case. Congress knew how to specify finality when it was intended, *see* 28 U.S.C. § 2411, and it did not do so here. Moreover, the cases cited by Sealy do not support its position. In *Caputo v. U. S. Lines Company,* 311 F.2d 413 (2d Cir.), *cert. denied sub nom. Imparato Stevedoring Corp. v. United States Lines Co.,* 374 U.S. 833, 83 S.Ct. 1871, 10 L.Ed.2d 1055 (1963); and *Howell v. Sinclair Refining Company,* 20 F.R.D. 623 (N.D.Ala.1957), the courts did indeed deny interest on judgments entered by the respective clerks, on the basis that the judgment entries had been made prematurely. But both cases fell squarely within Rule 54(b), which governs judgment: "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . . ." In such cases, the court may expressly direct the entry of judgment as to less than all of the claims upon an express finding that there is no just cause for delay. Until and unless the court does so, as the courts in *Caputo* and *Howell* emphasized, the clerk has no authority to enter judgment, for Rule 58 is expressly made subject to the provisions of

Rule 54(b). Both courts recognized that if the 54(b) direction had been made, thus rendering the entry of judgments proper, interest would have run from the date of entry. Here, in contrast, we do not have the separate claims that call Rule 54(b) into play, but merely one claim for two types of relief. Nothing in the district court's decision on equitable relief could have had any bearing on Ohio's valid judgment for damages, and it would make no sense to adopt the rule that the interest to which Ohio is entitled by law on its judgment properly entered under Rule 58 had to be forfeited if Ohio desired to press its request for equitable relief.

Sealy's second argument is that when motions for a new trial and for judgment notwithstanding a jury verdict are filed in a case, judgment on the verdict may not properly be entered until those motions are disposed of.[35] Sealy cites *Murphy v. Lehigh Valley R. Co.*, 158 F.2d 481, 485 (2d Cir. 1946); and *Christian v. Southern Railway Company*, 151 F.Supp. 192 (E.D.S.C.1957) (following *Murphy*), which do support the proposition advanced, but with which we are constrained respectfully to disagree. We note initially that there is a definite authority the other way. *Louisiana & Arkansas Ry. Co. v. Pratt*, 142 F.2d 847, 848-49 (5th Cir. 1944); *Litwinowicz v. Weyerhaeuser Steamship Company*, 185 F.Supp. 692 (E.D.Pa.1960); 6A Moore's Federal Practice ¶58.04[2] at 58-124-26 (1974). The latter authorities seem to us clearly more in keeping with the meaning of the Federal Rules of Civil Procedure. Rule 58, as we have said, calls on district court clerks to enter judgment on general jury verdicts promptly without even waiting for directions from the presiding judge, let alone waiting to see whether the losing defendant will file post-trial mo-

[35]This argument would theoretically deny Ohio interest only until May 27, 1976, when Ohio filed its remittitur, except that no renewed judgment was entered at that time or, indeed, until January 18, 1977. Because we reject the assertion that judgment was improperly entered on April 3, 1975, we need not decide whether, if the assertion were accurate, Ohio could legitimately seek interest for the period between May 27, 1976 and January 18, 1977.

tions. In fact, Rules 50(b) and 59(b), (e) define the timely filing of such motions as being not later than ten days after "entry of the judgment," the very act Sealy would have us hold cannot properly occur if post-trial motions are filed. Plainly Rule 59 and Rule 50 contemplate that judgment will be entered promptly without regard to whether post-trial motions are in the offing. So does Rule 62(b), which gives the district courts discretion to stay the execution of judgments pending disposition of post-trial motions.

Because of Rule 62, there can be no prejudice to a defendant if interest runs, as 28 U.S.C. §1961 provides, from the entry of judgment. If post-trial motions are successful, or if defendant gains judgment or a new trial on appeal, it will be forced to pay no interest. Where, as here the motions are unsuccessful or successful only to the extent of reducing the amount of the judgment, the defendant will pay only that interest to which the plaintiff is lawfully entitled. Ohio should receive the lawful rate of interest on its remitted judgment from the date of entry, April 3, 1975.

For the reasons stated herein, the final judgment herein is affirmed insofar as it awards Ohio $10,222,278 in damages, and reversed insofar as it denies all equitable relief and the right to interest from April 3, 1975 on the remitted damage judgment, and the case is remanded for further proceedings consistent herewith.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1243

OHIO-SEALY MATTRESS MFG. CO.,

et al., *Plaintiffs,*

V.

SEALY, INC., et al., *Defendants.*

TRANSCRIPT OF PROCEEDINGS
(JUNE 1, 1979)

[2] The Clerk: 71 C 1243, Ohio Sealy Mattress Manufacturing Company, et al. vs. Sealy, Incorporated; for ruling on pending motions.

The Court: Good afternoon.

Mr. Brace: Good afternoon, your Honor.

Mr. Neal: Good afternoon, your Honor.

The Court: Mr. Brace. Mr. Neal. I don't have formal rulings at this moment on these. I am prepared to rule and indicate my rulings. I will develop something later which will give all of the reasons.

On plaintiffs' motion for supplemental money judgment—this is that I reverse myself with relation to the remittiture on the suggestion that the Court of Appeals disagreed with it; but I think that the language is clear that the Court was not reversing me on that. So that motion will be denied. I suggest that we review 385 F. 2d at 840 and 843.

The second motion is the plaintiffs' motion for a second supplemental money judgment. This is the matter of the $400,000

times three equal $1,183,396. That is accompanied by a motion on the part of the defendants that that motion be stricken because it was based upon attachments to the motion which have not been proved in evidence or established in evidence and do not change the opportunity for the jury to have, even if reviewing the document in evidence which had not been received in evidence, the document [3] before them which had not been received in evidence but was before them, nevertheless could have arrived at their decision that the amount for that would be seven thousand-odd dollars. Under those circumstances, because the basis for the receipt of that information is not established evidentiarily, I should grant the motion to strike and deny the motion.

That leaves the third motion, which is a motion for trial by jury. This, of course, is with relation to those matters which I must look into under the mandate of the Seventh Circuit, and I would like to look into those matters. But for the purpose of a jury hearing on them, I am unable to find any basis upon which, the jury having arrived at a verdict on the legal matter and a judgment, I should not obey the Court of Appeals' mandate that I consider those matters myself. So I will deny that motion.

Now the question is whether or not I can rule on the remainder of the mandate back to me on the equitable questions without further evidence or further argumentation. I think that I should open the opportunity to the parties first to argue that I need further evidence or do not need it, and then if I determine that I don't need further evidence—if I need it, to hear it, and, if I don't need it, to certainly allow all the parties a full opportunity to argue the case, the decision, the law, as it relates to what [4] evidence we do have.

I leave myself open to you gentlemen for a suggestion as to timing.

Mr. Brace: I think we already have a schedule on that, your Honor.

The Court: We have already set up a schedule on that?

Mr. Brace: Yes.

Mr. Neal: We have a schedule for further briefing on the proposed findings and conclusions and we are scheduled for a hearing before you on the 25th of June.

The Court: Mr. Brace submitted, I believe, proposed findings of fact and conclusions of law.

Mr. Neal: We have also.

The Court: And you also, but I think that I will have to do the best I can to develop one that reflects the total impartiality of the Court as well as the wishes of the Seventh Circuit that I give full consideration to these other matters.

Mr. Neal: It is right to assume then, your Honor, that the question whether there will be need or opportunity for a further hearing will not be considered until June 25th when we come before you for a pretrial?

The Court: I could really consider that now. It would help both sides if you were to help me with that, as to whether or not there is need for further evidence. It would [5] also help the further scheduling which has already been set.

What is your position? Not as to jury but as to further evidence?

Mr. Brace: Our position as to further evidence, in view of the fact that your Honor has denied our request for a jury trial, is the same position which we expressed and which the defendants agreed to in October of 1976, namely, that any issues of fact decided by your Honor must be issues of fact which are unique to the question of equitable relief and could not include questions of fact which overlap with the case before Judge McMillen where

the defendants have moved to strike our demand for jury trial and that motion has been denied.

The Court: May I beg your indulgence to help me think through this "Judge McMillen case" and why I should be in any way involved in it or recognize its existing.

Mr. Brace: Do you want me to answer that?

The Court: Or look into any of it. I would assume, its being a mattress case, and I have lived with mattresses now since my first one--I think my first one was in my first two or three years on the bench. I would assume that it is a thick file. I don't know what it is about. I have tried to ignore it.

Could you help me with that.

[6] Mr. Brace: Yes. First of all, it is not that thick a file. It was stayed at the motion of the defendants for a two-year period on the ground that the decision of the Court of Appeals would tend to resolve the issues in that case.

The Court: Yes.

Mr. Brace: As your Honor will recall, that case, which is 76 C 810, was before your Honor in 1976, shortly after it was originally filed.

The Court: But very shortly, for a very short period.

Mr. Brace: That's correct. Just about as short as possible.

That case is an extension of the instant case, which basically seeks, among other things, damages for the period after the verdict in the case that has brought us together here today. So obviously there is a very close relationship between that case and this case, and, indeed, as we will point out to you when we file our papers on June 15th, I believe it is, many of the issues which are

raised by the parties' requests or suggestions regarding a final decree in this action are also before Judge McMillen.

I hope I have answered your question without going into unnecessary detail. These two cases are related and under a literal reading of the related case rule they should be in front of a single judge. But your Honor has denied our motion in that regard so I won't argue that again.

[7] The Court: Wouldn't it be better then for me to let Judge McMillen resolve his case as he see it?

Mr. Brace: That was one of the suggestions in our motion regarding trial by jury. We gave three choices. One of them was that the two cases be consolidated in front of some judge—we are not shopping for a forum but it is a little inconvenient, to say the very least, to argue a question in front of your Honor today or next month or whenever, and then argue the same question in front of Judge McMillen, exactly the same question.

So I think in the interests of saving time for the courts and the parties, saving money, too, that the two cases should be before a single judge, because it is very difficult—impossible, really—to coordinate them when they are before two different judges.

Now, whether they ought to be consolidated is another question that could be addressed if they were assigned to a single judge. Frankly, it would be my suggestion—and it is our request now—that they do be assigned to a single judge. Again, we are not forum shopping, and whether it is you or Judge McMillen or some third judge is a matter of indifference to us.

The Court: Could the case before Judge McMillen have been added to this case by amendment of the complaint?

Mr. Brace: Yes. We sought to do that in 1976 and your [8] Honor denied the motion.

The Court: To amend the complaint?

Mr. Brace: Right. In fact, the motion that your Honor just now denied included a request to that effect.

The Court: Was I wrong?

Mr. Brace: I think you were. Yes, sir, I think you were wrong. I think these two cases should be in front of a single judge.

The Court: Should the second case have been filed at all?

Mr. Brace: Yes, it should have been filed.

The Court: I see. You say a disposition of this matter will moot the other?

Mr. Brace: The two cases are related and anything that happens in either case has a potential impact on the other case. What that impact would be depends on what the ruling was, you know, but they obviously are interrelated to a very, very high degree.

The Court: I see.

Mr. Neal: Your Honor, I don't know whether you would like to hear comment from me on these matters or not. I think you know our position, which is that the matters before Judge McMillen are not the matters before you and that any attempt to grapple with the McMillen case in these equitable relief proceedings would just prolong and complicate and magnify and expand the job, the limited job, that the Court [9] of Appeals has asked you to perform on the remand.

But I understand you to have really ruled on that in denying their motion regarding jury trial.

The Court: Well, I would want to know your position about additional evidence.

Mr. Neal: Yes. Well, I was going to comment that I don't think I heard Mr. Brace respond to that question.

Mr. Brace: Well, I will then. I will say it again—

Mr. Neal: May I?

Mr. Brace: Excuse me. I did respond and I will repeat it.

Mr. Neal: Well, if you think you have responded, how about letting me continue?

Mr. Brace: Well, your Honor, if Mr. Neal is not familiar with our position, I think it would be helpful both to him and to your Honor to have that position in mind before he responds.

Our position is that the issues of fact to be decided by your Honor in connection with our request for equitable relief can be only those issues of fact which are unique to the question of equitable relief and cannot include any issues of fact which are involved in the case before Judge McMillen insofar as liability is concerned. This is the same position that we took, and that Dean Neal concurred with, in October 1976 when we were starting the hearing on equitable relief.

[10] The Court: That doesn't disturb their concern, the Seventh Circuit, with my being sure that my decisions with relation to equitable relief are consistent with the findings of the jury in this case.

Mr. Brace: No. That doesn't disturb that.

The Court: I see.

Mr. Neal: Your Honor, it seems to me Mr. Brace continues to talk to a different question than the one you asked. I thought you asked what the position of the parties was about the need for additional evidence to be taken in this proceeding before equitable

relief. Mr. Brace has spoken only about what kind of evidence you may look to and what kind of findings you may make.

Responding to that point, I have to say that I think that he is disagreeing with the opinion of the Court of Appeals, which is very clearly set out, which says that in making findings on equitable relief you are to look to the evidence that was before the jury as well as the evidence in the equitable relief hearing, as well as any additional evidence that may be taken. The Court of Appeals' decision on that is completely clear—the only thing you may not do, as the Court of Appeals has said, is make a finding that is inconsistent with the one determination which the Court of Appeals says the jury verdict must stand for. Subject to that, it is our position that you are not only permitted but [11] ought to make findings of fact based on the record so far as those findings of fact are necessary to enter the kind of equitable relief decree, if any, that you decide to enter.

Now, we still haven't spoken about whether any additional evidence is required. Our position on that is that there are some additional matters on which we would like the opportunity to adduce additional evidence because we think that additional evidence is material to support the requests for granting and denial of equitable relief that we have submitted.

Now, it seems to me that it may be premature for us to take a hard and fast position on that because it depends somewhat, I think, on what your Honor's inclinations are with respect to equitable relief. If your Honor felt in a position to enter a decree substantially along the lines that we have proposed without the need for any additional evidence, I think we would like to consider whether additional evidence can be dispensed with.

Of course, we would want to make sure—and I am sure your Honor would—that any findings and decree that you enter are adequately supported in case there is a further review by the

Court of Appeals. Our concern is to be sure that your Honor has before you evidence which we think is material to the equitable relief that we have requested and to be sure there is evidence to support whatever findings [12] and decree you eventually enter.

Now, as our submissions point out, there is at least one area of important change since your prior hearing and determination on equitable relief, and that is a change in the composition of the board of directors of Sealy and in the direction of Sealy. I don't know whether your Honor has had a chance to go through our proposed findings and our legal memorandum on that as yet, but you will remember that one of the major criticisms of the Sealy organization, going way back to the decision of the Supreme Court, was that licensees pursuant to the bylaws constituted the board of directors and since April 1978 the bylaws of Sealy have been changed so that licensees may no longer sit on the board of directors, and the board of directors as now constituted pursuant to the new bylaws is an independent board of directors composed of businessmen who have no prior connection with Sealy and no connection with any licensees.

We think that is an important fact bearing on the likelihood of recurrence of the violations charged in the plaintiffs' complaint and, therefore, is a matter that should be properly before your Honor in awarding equitable relief. Now, conceivably those matters could be stipulated to and an additional hearing would not be necessary; but to the extent that that is relevant to your consideration, we would want an opportunity to put the facts before you.

[13] The Court: Well, it is relevant to equitable relief even in the areas in which the Court of Appeals has indicated an interest—

Mr. Neal: Quite so, your Honor.

The Court: (Continuing:)—that I act prospectively. Injunctive relief says what you shall or shall not do in the future, and I

should not have to tell you not to do what you have stopped doing, except that the Court of Appeals indicated then that a general clause is always good in an equitable relief statement, and in order to know that I would assume that you would want an opportunity to put into evidence as a part of a hearing on equitable relief your present conditions, what has happened and what the changes have been, so that I wouldn't have to enjoin something that has already been voluntarily stopped.

Mr. Neal: That's correct, your Honor.

The Court: You have no objection to that, of course, have you, sir?

Mr. Brace: Yes, I do.

The Court: What is it?

Mr. Brace: My objection is, first of all, that what Mr. Neal has been talking about is also part of the matter in front of Judge McMillen, as to which we requested trial by jury; the defendants have moved to strike our jury demand, and that motion has been denied.

[14] We would ask on the issues raised by Dean Neal's oral statement, which does raise issues of fact, we would ask for a right to trial by jury on that. We would also object to Dean Neal's statement—he indicated that he would want to know first what your Honor's inclination was—

The Court: I heard that. Yes, that sort of took me aback, because I would have to sort of rule in front of my ruling before I could hear the evidence.

Mr. Brace: Right.

The Court: "If you tell me how you are going to rule, then I will tell you whether or not I need to give you any evidence to support the ruling that you're going to—"

Mr. Brace: That's right. I don't want to play the game that way.

The Court: But go right ahead.

Mr. Brace: Then the other objection is that we differ with Dean Neal's interpretation of the Court of Appeals' decision. So far your Honor has ruled against us and in favor of Dean Neal, but to whatever extent these differences remain unruled upon, we do differ.

I don't specifically have in mind the unresolved issues as to which we differ because, frankly, in my mind I can't separate what Dean Neal said just now from what I read in his submission a couple of days ago; but there are quite a few issues regarding the interpretation of the [15] Court of Appeals' decision where we do have differences.

The Court: You would not want to put in any additional evidence, would you?

Mr. Brace: I—I would like to emphasize the word "probably." That is probably correct.

I just read Dean Neal's submission on Wednesday and prepared a rough draft of our response to it and want to refine my thinking a little more, but as I stand here now, there is no particular thing I want to come in and prove, I—

The Court: Is there any possible chance that the parties could stipulate to all of the additional evidence that I might need?

Mr. Brace: I don't think that's so. Some of the statements that Dean Neal made, and with respect to which he suggested a stipulation, could not be stipulated. I would want my right of cross-examination, at the very least, and I would also want perhaps the opportunity to offer countervailing evidence.

If Dean Neal ultimately decides that he wants to try to prove what he has to some extent stated orally today, and to a greater extent stated in writing in his recent submission, then I would want also the opportunity to obtain discovery, which so far has been stalled, stopped, while we try to define what the issues are.

My suggestion would be that we follow the suggestion [16] if your Honor is to retain this case, that we follow the schedule originally set up last April, where we would file this multiple-briefing on each side simultaneously, a total of something like six or ten, and then get together on June 25, after all this has been done in writing, and try to identify the issues of fact which need to be tried and that could be properly tried in this proceeding, and what discovery, if any, is necessary in order to prepare the parties for that trial.

I am not insisting on that but it is my suggestion that since that schedule is in place, why not let it run out. But I wouldn't argue for that forcefully. We do have a schedule that would tend to sharpen these things up.

The Court: Would you suggest that in making that type of preliminary determination that in between you might insert what issues you can agree upon that may be necessary?

Mr. Brace: I am going to make a conscientious effort, and I hope Dean Neal does the same—I am going to answer his submission paragraph-by-paragraph, and I hope he'll do the same with mine, and I am going to make a conscientious effort to set forth the facts; to the extent I concede his facts, and there are quite a few that I do concede, I'll do it. To the extent it is simply a matter of maybe altering the wording and taking out some color words, I'll suggest ways to do that.

[17] To the extent that I would want—and this is going to be an important area—I would want the facts he states placed in

context, I would do that, and I think that if Dean Neal would do the same with respect to my submission, paragraph-by-paragraph, we would save an awful lot of time and reduce the issues of fact substantially. But there will remain, I am sure, if Dean Neal adheres to what he has stated in his submission, there will remain issues of fact to be tried.

The Court: There were to have been simultaneous filings and critiques, weren't there?

Mr. Brace: That was the schedule we established, correct.

The Court: And yours has been filed.

Mr. Neal: Both sides have filed.

The Court: And now we wait for the critiques.

Mr. Neal: Correct.

The Court: The 25th of June is when we really should be facing the problems that I am trying to face now?

Mr. Neal: Correct.

Mr. Brace: I am not objecting to your—

The Court: I am hanging onto you for no apparent reason except that I confess I like good lawyers and I just like to have them in front of me.

Mr. Brace: Well, it is a pleasure to practice in front of you, your Honor.

The Court: When so many come for just this one purpose, [18] and take time off on a Friday afternoon and stay with me for a full half hour, I inveigle them into explaining more and more. The Court can never learn too much about the case. It has to learn it from the lawyers.

Mr. Brace: Well, I am sure we are both here to help you do that, your Honor.

Mr. Neal: It does seem to me likely in the light of what both Mr. Brace and I have said that we will be asking your Honor for an opportunity to present some additional evidence, but I would not think it would be a great extent. But I assume we will discuss that further on June 25th.

The Court: Well, in equity, when equity is alone, I suppose that we don't follow this matter of burden of proof as meticulously as we do in civil hearings. So that there would be no reason to suggest that Mr. Brace must go with something first or waive the presentation of any evidence. All right. Well, we will try to be prepared for it on the 25th.

Mr. Brace: Thank you, your Honor.

Mr. Neal: Thank you, your Honor.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1243

OHIO-SEALY MATTRESS MFG. CO.,
et al., *Plaintiffs,*

V.

SEALY, INC., et al., *Defendants.*

TRANSCRIPT OF PROCEEDINGS
(AUGUST 24, 1979)

[2] The Clerk: 71 C 1243, Ohio-Sealy Mattress Manufacturing Company, et al. vs. Sealy, Incorporated, et al.; for pretrial conference and motions.

The Court: I don't know whether we should address ourselves to the motions first or go into the matter of the issues of fact which perhaps I need hear, I need hear testimony on, before a final conclusion on equitable relief.

One motion is for consolidation of one case, I believe, and another is a motion for consolidation of the others, is that right?

Mr. Brace: That's correct, your Honor.

The Court: They are cross-motions, are they?

Mr. Brace: Well, they are made in both cases. They are identical motions.

The Court: Are they your motions?

Mr. Brace: Yes, your Honor.

The Court: Let me hear you on that.

Mr. Brace: Very well. The reason I am presenting these motions—

The Court: Or should we brief that?

Mr. Brace: Whichever you prefer. I have a suggestion. These motions relate to the stay motion which is also being briefed currently and, in my view at least, this is the other side of the coin. Whatever valid reasons would lead to a stay could also be handled by consolidation in the [3] first instance.

My suggestion would be that next week I file not only the answer to their motion to stay, which has already been scheduled—I would be filing it a little bit early—but in that same document also state the reasons for consolidation, and then we just do it both with one document, and they would then have whatever time they wanted to respond and your Honor could decide it.

Mr. Neal: That's agreeable, your Honor.

The Court: It makes sense.

Mr. Neal: Yes.

The Court: May I inquire. One of these cases you want consolidated, though, is before Judge McMillen, isn't it?

Mr. Brace: That's correct. Actually, two of them.

The Court: Should you file that motion with him or with me, under our local rules?

Mr. Brace: Well, this is the earliest numbered case—

The Court: Yes.

Mr. Brace—and Judge McMillen, I understand, isn't here right now. So it would involve some delay.

The Court: Oh, you mean I am sitting as emergency judge for Judge McMillen to hear this—

Mr. Brace: Well, I would have no objection—

The Court: Let me set it up in the same briefing schedule then for him and for me.

[4] Mr. Brace: Very well.

The Court: What is the schedule you suggest, gentlemen?

Mr. Brace: We could—

Mr. Neal: (Addressing Mr. Brace:) Do you have in mind the other schedule that was—

Mr. Brace: Yes, I do, but my idea would be we can file our answer in the other motion next week, which would be earlier than scheduled, so, maybe, just to be on the safe side, why don't we take until the end of next week to file our document—and then how much time would you like?

Mr. Neal: A week.

The Court: All right, the end of next week and another week, and would you want to suggest a date allowing me a week?

Mr. Brace: You have already scheduled September 17th for filing. Perhaps we could just hang on to that date.

The Court: Let's hang on to the 17th. Good. That is as to both of these.

Mr. Brace: Correct, and I will also caption my response in the cases before Judge McMillen.

The Court: All right. Well, I promised to provide the parties in this litigation an outline of the areas of the case which will require additional evidence before I hear further argument concerning plaintiffs' request for equitable relief. I have now had an opportunity again to [5] review the trial record and the record of the

first evidentiary hearing on equitable relief in light of the opinion of the Court of Appeals in Ohio-Sealy Mattress Manufacturing Company vs. Sealy, Inc. 585 F.2d 821 (Seventh Circuit, 19/8).

I have reviewed these items bearing in mind the position of the parties on the issue as expressed in their memoranda and their proposals for findings of fact, conclusions of law and the final judgment and decree. Before discussing evidentiary matters I should like to state my understanding of the dispute at this stage of the proceedings.

Plaintiff is seeking various forms of equitable relief to supplement its jury award. There are three principal areas in which plaintiff wants this Court to grant relief. First, it would like the Court to enjoin Sealy, Inc. from enforcing provisions in the license agreement pertaining to the following subjects: plant location, exclusive manufacturing territories, the prohibition against licensees acquiring non-Sealy bedding manufacturers (the non-competitive interests clause), Sealy's right of first refusal, passover payments, and warranty repair charges.

Sealy, Inc., in its memorandum filed May 25th of this year proposed that the location clause, the provision for warranty repair charge and the passover payment provision" . . . be eliminated from their license agreements." Despite [6] disagreement between the parties as to the language to be used in a decree that would enjoin enforcement of these provisions, the defendant essentially has agreed to the elimination of them. Only the provisions of the licensing agreement concerning exclusive manufacturing territories, the non-competitive interests clause and Sealy's right of first refusal remain at issue.

Plaintiff also seeks to have the defendant divested of the licensees in Pittsburgh, Philadelphia and Florida. Defendant acquired these licensees by exercising its contractual right of first refusal.

Alleging that the defendant used this right unlawfully and that plaintiff otherwise would have obtained these licensees, Ohio-Sealy wants me to divest the defendant of these licensees and transfer them over to the plaintiff. The parties have not changed their positions on this issue since the trial of the case.

Finally, the plaintiff seeks to have me enjoin the defendant from requiring its licensees to purchase components of the mattresses from designated suppliers as a condition for using its trademark. Three of Sealy's subsidiaries manufacture springs and are designated suppliers. As part of its prayer for relief concerning the component requirements, the plaintiff demands that the defendant be divested of these subsidiaries.

[7] The defendant states in its memorandum dated May 25th, 1979, that it has ceased requiring licensees to buy components from specified manufacturers and that it will agree to equitable decree which enjoins this practice. Even so, this still leaves the matter of divestiture of its spring manufacturers to be resolved.

I have decided that I will need to hear additional evidence concerning the three provisions of the license agreement which remain in dispute. Of concern with respect to all of these provisions is the fact that the financial positions of the parties, their corporate structures and the economic conditions in the relevant market may have today changed significantly over the course of this lengthy litigation. The complaint in this case was filed eight years ago. The jury verdict was handed down over four years ago. I heard post-trial evidence on equitable relief almost three years ago. Whatever changes have occurred during this time should bear substantially on plaintiffs' prayer for injunctive relief.

For example, defendant's memorandum filed May 25, 1979, states that Sealy's bylaws have been amended to preclude representatives of licensees from serving on its board of directors. Defendant argues that this change eliminates the possibility of

Sealy's abusing its right of first refusal and, therefore, I should not enjoin it from [8] enforcing that right.

I will welcome any new evidence of this nature which the parties believe may be relevant to this issue. Where appropriate, the parties may wish to rely upon the services of expert witnesses.

With respect to the provisions for exclusive manufacturing territories in the licensing agreement, further evidence would be helpful in showing me how I can insure that adverse consequences to Sealy's national organization will not result from a decision enjoining enforcement of these clauses.

Plaintiffs' own expert witness, Professor Willard F. Mueller, gave opinion testimony at the post-trial evidentiary hearing about the potential effect on Sealy of entirely eliminating this provision. He said, and I quote him:

> "Well, whereas it may appear, and I guess I am pretty hard-nosed about restraints in this system, I am by no means indifferent to or not concerned with the effects that such changes might have in the entire Sealy organization or similar organizations, and if licensees could, indeed, place plants willy-nilly all over the nation, you could have a situation develop in the same areas where you would have more capacity than desirable, [9] and you could undercut the effectiveness of the association, the organization, at least in that area."

I think that's from 1 J App. 139 WFM.

The witness proceeded to testify that his concern for Sealy would be ameliorated if objective standards could be developed for determining whether a licensee should be permitted to establish a plant near or within another licensee's territory. That witness also testified that if these standards were applied by an arbitrator rather than by the Sealy's board of directors, the licensees would be assured of getting an unbiased disposition of their application.

I would like to hear more expert testimony on the general feasibility of this type of proposal and especially on the specific economic and financial criteria which would be relevant in deciding whether to permit a licensee to manufacture within an area already assigned to another licensee. The parties are free, of course, to introduce expert testimony, if necessary from the same witness, each, on any other alternatives which they may deem to be viable surrogates for the exclusive manufacturing territory provisions.

The non-competitive interests clause contained in the license agreement prohibits a Sealy licensee from [10] acquiring a non-Sealy bedding manufacturer. I shall need to hear that expert testimony and other evidence as to how this provision has operated in the past generally to foreclose competition in the relevant market, and how Sealy has used it specifically to plaintiffs' competitive detriment. In this regard, the parties should attempt to demonstrate whether the provision's adverse effect, if any, upon Ohio-Sealy are likely to continue or recur in the future.

I shall welcome further evidence concerning the right of first refusal. This evidence should provide guidelines which would permit a right of first refusal provision that would be consistent with the interests of both parties. Plaintiff has shown that the provision was an element of an array of license restrictions which defendant used to prevent plaintiff from making certain acquisitions of Sealy licensees. Plaintiff is seeking equitable relief to preclude such a result in the future.

The defendant, on the other hand, had an expert witness who testified that its organizational structure would be threatened seriously if it did not have a provision for the right of first refusal incorporated into the license agreement. Further expert testimony may be useful in aiding the Court in reconciling those diverse interests.

As I observed in my first opinion on equitable relief, there is no unquestioned precedent for this Court [11] to order divestiture in

a private antitrust suit under Section 16 of the Clayton Act. Moreover, in ruling on divestiture, a court sitting in equity must be sensitive to the problems inherent in attempting to terminate a business relationship of some duration like the one exists between Sealy and its licensees in Pittsburgh, Philadelphia and Florida.

I will not need to hear further evidence about the business feasibility of divestiture of the licensees at this point in time. On the other hand, divestiture in the case of the spring manufacturers raises different legal and practical problems. The record from the trial and the hearing on equitable relief contain much less factual evidence, and your expert evidence on the divestiture of the spring subsidiaries would be a very great value to me. Both sides may wish to offer some additional evidence on these matters. I would assume that one expert on each side would satisfy, if he is aware of everything and is given sufficient time to look into the entire case and the magnificent set of printed documents which you had done out in California before your went up the Court of Appeals, or when you did, as well as bringing him up to date with everything else that has happened, and perhaps also bringing the experts up to date with what may have happened to Sealy, Inc. in the interim, including the condition of the [12] corporation, as is reflected in the filings, the quarterly filings with our clerk of the court.

Mr. Brace: Yes.

The Court: So we will set a date for this a little later. I thought you might just want to let this sit as a preliminary suggestion. This is not a final order.

Mr. Brace: With respect to some of the matters, currently I am stayed from having any discovery in this case. Now, several of the matters your Honor mentioned relate to the internal events—

The Court: You would have to have the benefit of—

Mr. Brace: Right. I can't find out what happened just—

The Court: Well, I am sure that Sealy, Inc. is going to make available to you its new corporate structure as well as its financial condition and the history of it over these several months.

Mr. Brace: I would assume so. May we just have the ban lifted, and, of course, with the understanding that discovery will be confined on both sides to the issues you've outlined?

The Court: Well, can't we make our first steps after the 17th of September so that you will have had a chance to digest this and ask me to make changes in it before I—

Mr. Brace: Fine. Just as long as it is understood [13] that I will need some discovery at some point in time.

The Court: Yes. I know. Very well.

Mr. Neal: Yes. I think we welcome that procedure, your Honor. You are suggesting that we have that in written form and be able to perhaps submit written comments, or would you prefer—

The Court: Yes, I would appreciate that, so that I can come up with a final order on the 17th.

Mr. Neal: That is very satisfactory to us, your Honor.

Mr. Brace: It is fine with me. If Mr. Betz will get us the transcript we will go to work.

The Court: Well, he hasn't had a vacation but I think he likes you people. You have kept him pretty busy.

Mr. Neal: Your Honor, might I inquire whether at this time you have any thoughts about when the hearing might be scheduled?

The Court: Have you any suggestions, sir?

Mr. Neal: Well, we had rather anticipated, I think, that we might be going forward sooner than after the 17th. We had hoped that September might see the end of the equitable relief hearing. We are prepared to suggest to your Honor possibly the third week in September or somewhere in there would be suitable from our standpoint.

The Court: I will be very pleased to go forward as soon as we possibly can after the 17th, and I will set aside [14] everything that I can. I can't set aside administrative matters nor requirements of—what?—seeking to get some more judges on the bench, and things like that. But I can get other judges to handle my cases so that we can go ahead as early as we possibly can.

Mr. Brace: I need a little more, though, than between the 17th and the 21st of September to do the discovery I had in mind.

The Court: Well, perhaps the 28th would put you in good stead.

Mr. Brace: Well, I'm not sure even then. I would just as soon start the discovery now and then the 21st might be a reasonable date; but I certainly wouldn't try to do the job that a case of this sort merits in just a few days. Even two weeks.

The Court: I understand. Let's think in terms of your own schedules, too, and mine. We will come to a conclusion on the 17th.

Mr. Brace: OK, thank you.

Mr. Neal: Thank you, your Honor.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1243

OHIO-SEALY MATTRESS MFG. CO.,
et al., *Plaintiffs,*

V.

SEALY, INC., et al., *Defendants.*

## MEMORANDUM OPINION AND ORDER, MEMORANDUM OPINION AND ORDER ON EQUITABLE RELIEF
(FILED MARCH 6, 1981)

On January 30, 1981, I entered of record a Memorandum Opinion and Order granting equitable relief to plaintiff in this case. As in the earlier orders the parties are referred to herein as plaintiff and defendant, though the reference is to all of the named plaintiffs and named defendants. The injunctive decree restrained the defendant licensor from enforcing certain provisions in its licensing agreement. These provisions include ones providing for a product service repair charge, pass-over payments, a plant location restriction, and a restraint upon a licensee preventing it or any of its stockholders from owning an interest in an interbrand competitive organization. The Decree also retrained the defendant from accepting payments from suppliers of products necessary to the production of Sealy mattresses. It restrained the defendant from withholding approval of the use of an independent supplier of component parts even when such supplier met Sealy's objective standards of quality and design. It enjoined the defendant from withholding from any of its licensees approval of a sale of all or part of its license when the proposed buyer met certain objective standards set forth in the licensing agreement. It restrained the defendant from enforcing provisions

in its licensing agreement which served to make intrabrand competition a basis for withholding approval of a licensee's disposing of its license, and it enjoined the defendant from exercising a contractual right of first refusal under given circumstances.

The decree went further, however, to authorize the defendant to include in the licensing agreement the opportunity for a licensee to utilize an already existing arbitration arrangement when it believed that the defendant was exercising the right of first refusal for other than noncompetitive purposes. The decree also mandated the defendant to turn over to the plaintiff certain pass-over charges and service repair charges which it had collected but was holding in trust for the plaintiff's benefit, pending the outcome of these proceedings. Finally, the decree went on to reconfirm earlier determinations not to require divestiture of certain licenses defendant had acquired a number of years ago through the exercise of the right of first refusal, as well as an earlier determination that the exclusive manufacturing territory clause in the licensing agreement, could stand.

When issuing the Memorandum Opinion and Order on Equitable Relief, I invited the parties to move for reconsideration on any ground. Plaintiff made its motion for reconsideration. The motion has been fully briefed by both sides.

Plaintiff has asked me to change my position regarding most of the provisions of the Decree. Of particular importance is my mandate that defendant turn over to plaintiff the monies that have been collected for cross-over payments; the position I have taken that the contractual right of first refusal might remain in a limited manner in the licensing agreement; that the contract provision setting up exclusive manufacturing territories might be retained; that there need be no divestiture of the three licenses which years ago the defendant acquired by exercise of the right of first refusal; and, that arbitration might be utilized by the parties when a licensee believes that the defendant has improperly, and for anti-competitive reasons, utilized the contractual right of first approval.

I have reconsidered in their entirety the provisions of the Decree, and it is my opinion that with few exceptions the Decree should stand. I have, however, concluded that as to certain of the provisions I was in error and that those provisions should be removed from the final order. I shall address briefly each of those provisions below and then on my own motions order that they be deleted from the final order.

**Accumulated Improper Charges**

Plaintiff objects to there appearing in the Decree a mandate to the defendant to turn over to plaintiff the monies it has collected and preserved from cross-over payments and service repair charges and at the same time a denial of a right to restitution. The objection is to the effect that these things are a denial of due process and the taking of a position that is inconsistent with my holding that there be no divestiture over to plaintiff of three of the licensees which defendant had acquired a number of years ago by the exercise of the right of first refusal. In other words, I was granting restitution in the matter of pass-over payments and service repair charges, but denying it as to three licensees which were acquired in what now I find to be a manner violative of the anti-trust laws. It is true that the turnover of accumulated pass-over payments and service repair charges is a form of restitution as in form divestiture also could be. To be consistent I should not have included in the decree the turnover of the special charges that had accumulated during the pendency of this case.

It appears that the defendant voluntarily retained the accumulating charges and prior to my decision of December 1, 1980, had unilaterally agreed to turn-over the charges at the end of the case. Since defendant had agreed to do this, the decree on Equitable Relief need not address the matter other than to consider it as evidence bearing upon the question of restitution. To the extent to which it may reflect acquiescence by the defendant (if it does so reflect) on the issue of restitution I disagree with defendant. I find

as I did in the original opinion that restitution in antitrust cases is the exception and not the rule.

Here plaintiff utilized its opportunity to present to the jury its full claim for damages from these improper charges. Differing from the divestiture issue, it would not have been contemplated that future damages from these charges would go beyond the day when equitable relief would cut them off. Plaintiff had an opportunity to argue those damages to the jury as well as any lasting effect which the injury, as long as it continued, might have upon the future well-being of the plaintiff.

Divestiture in this case, however, is different, since at the time of the trial the acquisitions were completed acts and the lasting effect of those acts upon plaintiff's well-being was a proper subject for damages, a subject to which to a limited degree plaintiff directed the attention of the jury. Probably the parties ought not have agreed on a trust handling of these special charges, leaving it to future litigation or agreement after this decision. Since, however, the parties have their own agreement, and the matter should not have been presented to this court in the context of these proceedings, it is advisable that the Decree not include the provisions for the special charges as mandatory injunctive relief. Accordingly reference to this trust fund of accumulated improper charges will be deleted.

**Arbitration of Right of First Refusal**

In the original Decree the court, in retaining the right of first refusal, sought to utilize the arbitration procedure already provided for in the licensing agreement as a means of reducing the likelihood of annual litigation over the years between these two strong competitors. I find, however, and am now convinced that the general rule governing arbitration of antitrust matters is very strong; it is to the effect that claims under antitrust laws are "of a character inappropriate for enforcement by arbitration."

*American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F.2d 821, at 825 (2d Cir. 1968), *quoting Wilko* v. *Swan*, 201 F.2d 439, 444 (2d Cir. 1953), *rev'd*, 346 U.S. 427 (1953).

Although compromise of disputed claims by arbitration are favored by the courts, this has been found to be insufficient to override the policy of the federal antitrust laws favoring the judicial resolution of disputes raising antitrust claims. *Bache Halsey Stuart, Inc.* v. *French*, 425 F.Supp. 1231 (D.C. Cir. 1977), *citing American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, *supra*. It is thought that antitrust actions effect [sic], not only the parties to the litigation, but, the public at large and that these actions are best resolved through judicial procedures as they involve complex and difficult issues. *Id.* As with many general rules, this too has an exception, but, it is one which is ill at ease in this case. When an agreement to arbitrate is made after a dispute arises, the standard rule precluding arbitration of antitrust matters may give way to the wishes of the parties. *Cobb* v. *Lewis*, 488 F.2d 41 (5th Cir. 1974). It is clear that considering the posture and circumstances of this case, invocation of this exception is not justified. Accordingly, all references made to arbitration will be deleted.

**Other Objections**

All other of plaintiff's objections have been fully reviewed. They are now overruled for the reasons set out in the original opinion.

**ORDER**

It is ordered that the Memorandum Opinion and Order on Equitable Relief ruled on January 30, 1981, be corrected and amended as indicated above by deleting from it the several certain matters described above and that a copy of said opinion containing these changes and deletions filed herewith stand as the final opinion in this matter.

**Memorandum Opinion and Order on Equitable Relief**

A six member jury having found the defendant, Sealy, Inc. (Sealy), a licensor, to have engaged in a scheme of market allocation in violation of The Sherman Act, awarded damages of $6.8 million to the plaintiffs, the principal one of which was a licensee, Ohio-Sealy Mattress Manufacturing Company. Damages were trebled and then Ohio-Sealy accepted a 50% remittitur rather than go through a new trial of the case. No equitable relief was granted at that time. The case is now back before this Court on remand from the Seventh Circuit Court of Appeals with directions that equitable relief be granted and that it be fashioned in a manner not inconsistent with the findings of the jury. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978)*

The Court of Appeals found that a number of the provisions in the licensing agreement when exercised together could have the effect of allocating markets by restricting the geographical areas in which Sealy licensees might sell Sealy products.

More specificially, based upon the amount of damages awarded, the Court of Appeals was of the opinion that the jury must have found that the "right of first refusal" provision of the agreement was exercised by Sealy in at least one instance in combination with other provisions to deliberately effect an exclusive division of territories. *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc., supra,* at 844.

When restraints of trade, such as the type found in the case at bar are the products of a horizontal conspiracy (in this instance a conspiracy between Sealy and others of its licensees), violations of The Sherman Act must be found to have existed. Sherman Act,

*There are several plaintiffs and several defendants. For the purpose of simplicity, in this opinion reference will be made to the plaintiffs and the defendants only in the name of the respective principal plaintiff, Ohio-Sealy Mattress Manufacturing Company and defendant, Sealy, Inc.

15 U.S.C. §1 *et seq.* The horizontal structure of the Sealy organization is not open to question. *U.S.* v. *Sealy,* 388 U.S. 350, (1967); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc., supra* at 827.

The Sealy program of assigning areas of primary responsibility (APRs), included in the licensing contract, permitted Sealy and its licensees to conspire to use combinations of one or more of at least five provisions of their licensing agreement to restrain one licensee, Ohio-Sealy, from competing with its brother licensees, thereby violating the antitrust laws. The following provisions were found to have been capable of being used in concert to achieve an unlawful allocation of markets: the Plant Location Clause, the provision for Product Service Repair charges, the provision for Pass-Over Payments, the Exclusive Manufacturing Covenant, and the provision granting Sealy the Right of First Refusal. Acknowledging that the effect of the Sealy operational design could have been to divide the competitive market, Sealy Inc. has now expressly agreed to the elimination of the Plant Location Provision, the Pass-Over Payments Provision and the Provision for Repair Charges from the licensing agreement.

I.

Sealy, Inc. is an association of mattress manufacturers which came into being in order to most effectively aid in the joint exploitation of the general mattress market.[1] It is the holder and licensor

[1]The plaintiff, Ohio-Sealy, Inc., is one of the charter members. It is one of the few members which over the years has sought to compete with and, in certain instances to acquire one or another of its fellow licensees. As was described by Sealy's counsel in his opening statement to the jury in the trial of the case:

> [A]s of 1974 Ohio-Sealy owns six licensees around the country and has seven plants. . . . [T]hat is more than any other licensee of Sealy has gotten. In the past ten years Ohio-Sealy has grown tremendously, extensively. Their sales have increased 460 percent from 1965 to 1973.

Jury Trial Proceedings, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.,* No. 71 C 1243 (N.D. Ill. Dec. 4, 1974). Reprinted in the U.S. Court of Appeals for the Seventh Circuit Joint Appendix, Vol. 2, p. 27.

of various patents, trademarks and a reservoir of good will created by the quality of its product and its national advertising campaign. Sealy has granted the privilege to use its name, its trademarks, and its patented products to those it believes would best promote its reputation. As the licensor, it is not only a privilege to determine who will manufacture its products, "[b]ut, there is an affirmative duty owed by the licensor to the public to assure that in the hands of its licensee its trademark continues to represent that which it purports to represent. . . ." *Siegel* v. *Chicken Delight*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

Although a trademark cannot be legally used as a device for Sherman Act violations, 15 U.S.C. §§ 1051, 1115(b)(7), the trademark owner must maintain sufficient control over the nature and quality of the product to sustain his original position of guarantor to the public that goods bearing its trademark are of the same nature and quality as before the grant of license. *Susser* v. *Carvel Corp.*, 206 F. Supp. 636, (S.D. N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. granted*, 379 U.S. 885 (1964), *cert. dismissed*, 381 U.S. 125 (1965).

In determining equitable relief it became necessary to balance, among other things, the interests of the antitrust laws against the interests of the patent and trademark laws and against the right of property owners not to be deprived of their property without due process of law. I concluded, therefore, that to determine equitable relief it would be of great importance to receive additional evidence concerning two of the contract clauses in particular: (1) the exclusive manufacturing territories clause, and (2) the right of first refusal provision.

Although the responsibility of the Court in devising relief is not necessarily to be limited by the materials that have been presented by the parties, nor by the offers that they make of proof or their tenders of legal principles, in a case such as this, I considered

there to be a need for expert testimony. I urged, therefore, both parties to present economic and financial data relative to their respective organizations as well as to matters concerning the mattress industry generally. In addition, I requested the opinion testimony of expert witnesses regarding the effects upon the market place of the exclusive manufacturing territories clause and the right of first refusal provision. I offered the parties the opportunity to comment fully on the criteria which would be relevant to my deciding whether to permit a licensee to manufacture within an area already assigned to another. I then asked each to develop objective standards under which Ohio-Sealy could freely compete in both intra and interbrand bedding markets while still preserving the opportunity of Sealy, Inc. to protect its property rights.[2]

At the equitable relief proceeding, held subsequent to the Seventh Circuit decision, I heard witnesses testify, among other things, as to sales outside of the APRs. Statistics related to shipping and manufacturing costs, geographics of regions in which sales take place and various other relevant facts were cited. In concluding the proceedings, I made a final invitation to the attorneys to make available to me any other relevant matters which they would have liked me to consider.[3]

II.

Based upon an understanding of the exclusive manufacturing territories provision as set out in the 1975 Sealy Uniform License Contract, the most recent licensing agreement, I decline to enjoin the use of its operation. From the evidence adduced at the equitable proceedings I have been able to determine that the exclusive manufacturing territories provision, which allows only one licensee to manufacture Sealy products within a single APR, prevents excess capacity from occurring in such area. Should excess levels

[2]Transcript of Proceedings, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243 (N.D. Ill. Aug. 23, 1979).

[3]Transcript of Proceedings, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243 (N.D. Ill. Nov. 9, 1979).

be reached, the potential for weakening the Sealy structure, for decreasing competitive impact in the mattress industry, and for creating the risk of harming consumers, is substantially heightened. Plaintiff's expert witness, Dr. Willard F. Mueller, a distinguished scholar who holds a position as Research Professor in Agricultural Economics and is also a professor in the law school of the University of Wisconsin, testified both as the principal witness for the plaintiff and as an adverse witness for the defendant. Professor Mueller testified at both the equitable relief hearing in 1976, and in the more recent hearing on November 7, 1979, that even he had doubts about the consequences of permitting licensees to build and locate plants anywhere they wished and that the effectiveness of the organization could be undercut.[4]

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[4]At the earlier equitable relief proceeding, October 14, 1976, Mr. Brace, counsel for the plaintiff, asked the following question of Dr. Mueller:

> [G]oing to the other extreme then Dr. Mueller, suppose the manufacturing territories were totally obliterated and each Sealy licensee had an unfettered discretion to put a plant any place . . . it wanted, would you give us your opinion as to the effect of that, taking into consideration the legitimate interest in both the licensee and the licensor and the integrity of the licensing system?

Dr. Mueller responded:

> [W]hereas it may appear and . . . I'm pretty hard nosed about restraints in the system, I am by no means indifferent to or not concerned with the effects that such changes might have on the entire Sealy organization or similar organizations; and, if licensees could, indeed, place plants willy-nilly all over the nation, you could have a situation develop in some areas where you would simply have no more capacity to develop than would be desirable and you could undercut the effectiveness of the association . . . at least in that area. I don't expect that businessmen make decisions unless they expect to make profits. Nonetheless, even if it were just due to error . . . I am concerned with the probability that complete elimination of that particular provision [might] occur.

Direct Examination of Willard F. Mueller. Evidentiary Hearing and other Proceedings on Equitable Relief, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243 (N.D. Ill. Oct. 14, 1976). Reprinted in the U.S. Court of Appeals for the Seventh Circuit Joint Appendix, Vol. 1, p. 139.

I am convinced that to permit a licensee a total unconstrained right to develop manufacturing plants anywhere throughout the country it chooses is tantamount to permitting it to appropriate to itself the property of the licensor. Such unharnessed freedom permits a licensee to assume the status of a co-licensor,[5] to whom property rights and privileges, rightly belonging only to the licensor, are passed. This would prevent Sealy's performance of lawful duties owed its licensees and would be in derogation of Sealy's own basic property rights.[6] Thus, the legitimate interest of Sealy,

[5]It should be noted that the Sealy, Inc. Uniform License Contract, Section IV, Paragraph E, provides that the Licensee covenants and agrees not to grant any sublicense under the contract to any person or entity without prior consent of Sealy. It is clear that Sealy, Inc. as owner of patents, marks and copyrights for the Sealy products, did not intend for this right to be shared without express grant.

[6]Dr. Mueller, in his testimony of October 14, 1976, suggested the idea of implementing a system which would allow a licensee to make application to Sealy, Inc. in order to obtain permission to build a manufacturing plant within an area already assigned to another. The proposal termed an "in-between" system, was to preserve the legitimate interests of the Sealy organization while serving the public interest. Because I was impressed by the "in-between" concept I asked the parties to develop objective standards by which such a plan would be workable.

At a further hearing on equitable relief, Dr. Mueller testified that there were at least two viable grounds for establishing a new plant within an exclusive territory; one, the area of primary responsibility was being inadequately served; two, the existing licensee within the APR was a dominant force in the market and with a new licensee the market would be enhanced by intra-brand competition. Dr. Mueller proposed that performance of the licensee already operating be measured by the BPI in order to determine whether such a licensee was an ineffective or dominant force within a market area. It was contended that a high market share, as measured by BPI, would indicate a dominance and a low market share would be indicative of inadequate performance.

I do not agree that the BPI index alone would be a satisfactory measure of the adequacy of the capacity of the licensee in an APR. As indicated in the direct examination of Dr. Peter O. Steiner, an expert witness for the defendant, and a Professor of Economics and Law at the University of Michigan: if, for example, a particular area had low sales

*(Footnote continued on next page.)*

Inc. to guard against the unsurpation of exclusive rights, justifies restrictions upon what otherwise would be an unlimited and detrimental expansion of the license.

Maintaining the exclusive manufacturing territories provision, under a revised contract permitting a licensee freedom to locate plants along the periphery of its APR would tend not to have the effect of allocating markets. If at the same time the plant location provision is eliminated, the product service repair charge and pass-over payments provisions which, as the Court of Appeals said, the jury was entitled to find "were parts of a plan of market allocation," were abandoned or enjoined, the opportunity of competing licensees to sell mattresses freely in areas of primary responsibility other than their own would make substantial intrabrand competition possible for all of Sealy's licensees and in particular, for Ohio-Sealy. Since Sealy has conceded this point and has volunteered to be enjoined from maintaining these provisions in its licensing agreement, no useful purpose is served by belaboring these issues.[7]

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*(Footnote continued from previous page.)*
relative to the BPI index, this could be the reflection of a low demand in that area for the Sealy product due to any number of factors, i.e., lack of population growth, few new household formations and little migration. As both sides in this case have indicated, it would be a difficult task to establish objective standards to estimate whether additional plants were needed and could be supported in a given area of primary responsibility.

[7]To preclude Sealy from in the future adding to its licensing agreement other similar impediments to the opportunity of its licensees to sell mattresses in APR's of neighboring licensees it would seem important to add a general prohibition against programs that would transform the exclusive manufacturing territory provision into a scheme for allocating markets. As the Court of Appeals said, "[o]nce a violation has been established as at least one is here, the court may properly enjoin the defendant from 'other related unlawful acts.' . . . This practice serves the public interest by 'effectively pry[ing] open to competition a market that has been closed by defendant's illegal restraints.' . . ." *Ohio Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 845 (7th Cir. 1978).

## III.

The "right of first refusal" has been used by Sealy in its Uniform Licensing Contract as a means of purchasing the business of a selling licensee and thereby to reacquire its license prior to any final sale to a prospective buyer. The mechanics of the first refusal right are such that Sealy has the privilege of pre-empting a sale to any party by matching the offered price and if the offer to sell is not withdrawn, to itself make the purchase. In the alternative, should the selling licensee withdraw its offer, which is its option, it may re-offer to sell the business again at a higher price, thus, beginning the entire cycle again.

Plaintiff contends that exercise of the first refusal right by Sealy, Inc. stifles competitive bidding on the business of a selling licensee. Plaintiff's theory is that a party wishing to purchase a business for sale will be intimidated by the right of Sealy to exercise the first refusal provision. However nothing in the evidence shows this theory to be the case. To the contrary, exercise of the right appears to provide a licensee choosing to sell its business the assurance that Sealy, Inc. will look at the proposition and possibly attempt to acquire the business for itself thereby presenting the opportunity for rivalry. Competitive bidding between Ohio-Sealy and Sealy, Inc. has, in fact, taken place on numerous occasions and has in at least one instance inured to the benefit of the selling licensee.[8]

[8]In June of 1970 the Florida licensee, York Sleep Products, Inc. entered into an agreement to sell its business to Ohio-Sealy for $1,063,000. It notified Sealy, Inc. of the proposed transfer. Sealy's Board of Directors voted to acquire the Florida licensee by exercising its option. On September 21, 1970, the Florida licensee exercised its right of withdrawal under the license contract and withdrew the business from sale. In March of 1972, Ohio Sealy entered into a second agreement to purchase the Florida licensee for the price of $3,155,000. In June of the same year Sealy's Board of Directors voted to match that price. There was no withdrawal of the second offer of sale and Sealy, Inc. acquired the Florida licensee. Exhibits, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243. Reprinted in the U.S. Court of Appeals for the Seventh Circuit Joint Appendix, Vol. 1. PTX 173/DSX 28, p. 357; PTX 174/DSX 29, p. 359; PTX 204, p. 371; PTX 390, 69 Rec.

Related to this, plaintiff seems to suggest that market allocation occurs whenever a prospective purchaser shies away from bidding on the sale of a business because it knows of Sealy, Inc.'s right of first refusal. Plaintiff cites no authority for such a proposition and it is doubtful that there is any reference in the law to support this contention. The instant case is not far different from the situation in which a potential buyer might shy from having to compete with a "deep pocket" rival, or the situation in which having made an initial bid, a prospective buyer might be discouraged by a subsequent bid of a substantially larger amount. While these examples and others point up the nature of a competitive system, they do not describe market allocation.

Sealy, Inc. is not in the business of selling licenses; its end product is mattresses. Although we must be concerned with maintaining a competitive market wherever the sale and purchase of anything has an effect upon interstate commerce, including the sale and purchase of opportunities to be the seller of a product, under the facts of this case, the issue before this Court as it relates to market allocation is not whether the right of first refusal may deter one from competing for a business, but whether the first refusal right can be used to foreclose competitive markets by rendering them inaccessible. Thus, the important complaint of the plaintiff is that the right of first refusal, when exercised in conjunction with the exclusive manufacturing territories provision, creates a restraint in the mattress market. The position of plaintiff is strengthened by the testimony of the defendant's expert witness, Professor Peter O. Steiner, who testified during cross-examination that the combination of the two provisions would make it impossible for Ohio-Sealy to acquire a Sealy plant outside one of its already existing territories.[9] The contention is further strengthened by evidence introduced which revealed that to ship bedding products into markets over 275–300 miles from the place of

[9]Transcript of Proceedings, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243 at 434 (N.D. Ill. Nov. 8, 1979).

manufacture is onerous and impractical. And a cost analysis which focused on selling merchandise of this type from such great distances supports the conclusion that should Ohio-Sealy wish to sell in a market not contiguous to one of its own, it could, by the exercise of the right of first refusal, be denied access to some of the most desirable markets.

This does not suggest that Sealy, Inc. has or would exercise its right of first refusal each time Ohio-Sealy attempts to move into a new market. Indeed, it is part of the record that Sealy's Board of Directors has in the past voted not to meet the offers of Ohio Sealy with regard to certain acquisitions.[10] Nevertheless, recognizing the effects of the exclusive manufacturing territories provision when exercised in combination with the right of first refusal it would be improper to permit the operation of an unrestrained agreement which could be deliberately employed for the purpose of allocating markets.

While there must be a limitation placed on the use of the right of first refusal there can be little doubt that Sealy has legitimate interests which could be impaired by actions of Ohio-Sealy were it not to have the use of such an option. Sealy has a continuing stake in the identity of its licensees, defined by its need to promote its product, expand its business and maintain the integrity of its patents and trademarks. Plaintiff has fully acknowledged the value of the "Sealy" brand. Plaintiff's expert witness, Dr. Mueller, testified that although each licensee is independent and entitled to make its own business decisions, it should not take action which would "adversely influence the . . . integrity of the licensing system to which [it] belongs." Dr. Mueller went on to explain that by "integrity of the licensing system" he had reference to "the heart of the system", the "Sealy brand;" "that which Sealy, Inc. has

[10]Ohio-Sealy entered into agreements for the purchase of the Randolph, Massachusetts license in 1972 and for the purchase of the Atlanta license in 1973. On neither occasion did the Sealy Board of Directors opt to meet the offer, and Ohio-Sealy acquired them.

done so well in creating." He stated that if action were taken which would detract from the "heart of the system" and make it less valuable to Sealy, Inc. he would, as an economist, be concerned.[11] For these and similar other reasons, the first refusal right is invaluable in assuring that the Sealy brand is not adversely effected.

It is appropriate to ask when Sealy's exercise of the right of first refusal would be a lawful effort to protect the brand from injury and its ownership from usurpation and when its exercise of the right would be an anti-competitive practice limiting the available market. In making the determination, intent and purpose of both Sealy and the prospective purchaser must be of paramount concern. If, considering all the circumstances, the course of conduct of the prospective purchaser is one directed toward gaining for itself a position tantamount to that of a co-licensor and eventually controlling the brand, the exercise of the right of first refusal would not be anti-competitive. If on the other hand, and, considering all of the circumstances, the intent and purpose of Sealy is to prevent a Sealy licensee, who is also a prospective purchaser, from competing with other licensees, then the exercise of the right of first refusal would be anti-competitive and in violation of the antitrust laws. In order that the true equities of the case at bar be reflected in the relief fashioned by today's decree, I conclude that I must enjoin any exercise of the right of first refusal where the intent on the part of Sealy is anti-competitive.

VI.

Quite recently the Court of Appeals in another Sealy mattress case, *Ohio-Sealy* v. *Hoover Ball Bearing Co.*, No. 76 C 1579 (September 12, 1980), upheld the decision of Judge Thomas R. McMillen of this court. In *Hoover*, Ohio-Sealy alleged illegal

[11]Direct Examination of Willard F. Mueller. Evidentiary Hearing and other Proceedings on Equitable Relief, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243 (N.D. Ill. Oct. 13, 1976). Reprinted in the U.S. Court of Appeals for the Seventh Circuit Joint Appendix, Vol. 1, p. 134.

tying arrangements were practiced between Hoover and Sealy under the terms of an agreement in the license that violated Section 1 of the Sherman Act, and Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The provision in question required licensees to purchase Hoover manufactured component parts used by the licensee in the manufacture of mattresses for which Sealy, Inc. was rebated a percentage of the sales.

In August of 1978, Judge McMillen entered summary judgment in favor of Ohio-Sealy as to the issue of whether payments of rebates to Sealy constituted unlawful brokerage payments in violation of the Robinson-Patman Act. And, in April of 1979 a jury found that Hoover had participated in a tying arrangement with Sealy which constituted a *per se* violation of Section 1 of the Sherman Act. Judge McMillen denied the request of Ohio-Sealy for equitable relief to enjoin Hoover from thereafter paying any further rebates to Sealy, finding that the illegal conduct had been discontinued and that injunctive relief was neither necessary nor justified to prevent future harm to plaintiff.

It is not my purpose to cite *Hoover* as authority in this decision, but to use its recitation of evidence as a fact of which this court takes judicial notice, a fact which corroborates Sealy's representation in its brief that it has completely discontinued illegal conduct regarding tying and price fixing. However, considering the posture of this case, I am constrained to enjoin these practices as a part of a comprehensive decree.[12]

V.

When I denied equitable relief in 1977, I declined to honor Ohio-Sealy's request for a divestiture remedy. Encouraged by a statement and footnote found in the October 11, 1978 decision of

[12]In defendant's memorandum regarding equitable relief, Sealy consented to having these practices enjoined. No. 71 C 1243, p. 17 (May 28, 1979).

the Court of Appeals, plaintiff now renews its request that Sealy be made to divest itself of and turn over to plaintiff the Florida, Philadelphia and Pittsburgh licenses, all three of which Sealy acquired through the exercise of the right of first refusal. Ohio-Sealy requested the court to re-open the evidence on equitable relief to receive proof regarding the use of the right of first refusal by Sealy, Inc., to acquire a fourth license, that of Portland, Oregon, which Sealy acquired approximately one year ago.

Plaintiff cites Section 16 of the Clayton Act, 15 U.S.C. §26, as authority for the proposition that divestiture is available to a private plaintiff as an element of equitable relief in an antitrust suit. I find that divestiture in a private antitrust case is a difficult remedy to classify. If divestiture is necessary to make the offended party whole, its award should be left to the discretion of the jury along with all other damage awards; plaintiff here did not ask the jury to consider it. If divestiture is meant to be punitive, it seems that it should be reduced to a dollar and cents value; Congress has pre-empted the question of punishment by mandating that the damages award be tripled. Further, if in a private antitrust suit the question of divestiture is of an equitable nature, the court should determine that its order is necessary to prevent the recurrence of the illegal conduct.

Plaintiff urges that it is entitled to be placed in the same competitive position which it would have occupied had there been an absence of the unlawful conspiracy, for which the defendant was found guilty, citing *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561, 571 (7th Cir. 1951) *cert. denied*, 342 U.S. 909 (1952). Under *Milwaukee Towne* "[p]laintiff is entitled to a decree which will place it only in the same competitive position which it would have occupied . . ." *id.*, not greater. Yet, in the present case, plaintiff insists that in addition to the money damages it was awarded, the Florida, Philadelphia and Pittsburgh licensees acquired by Sealy in the period of 1970–1972 should be disgorged by the defendant and turned over to it. Ohio-Sealy contends that divesti-

ture is an equitable remedy analogous to restitution and that one who has been unjustly enriched at another's expenses is required to divest itself of ill-gotten gains. It is plaintiff's contention that this Court may require restitution of the licenses in the present case under general equitable principles. Over the years, we have often used the word "restitution" in situations in which it was misplaced, thus making it difficult to clearly characterize the term. It has been said that restitution can be legal or equitable depending on the nature of the rights involved. *Bernstein* v. *Universal Pictures, Inc.* 79 F.R.D. 59, at 67 (S.D. N.Y. 1978).

In the instant case, it would be grossly unfair for this Court to characterize as equitable restitution that which in reality would be a supplement to the award of damages and as such, a matter for the jury. The grant or denial of the right to a jury proceeding cannot be made to turn on the choice of words used in a pleading. *Bernstein* v. *Universal Pictures, Inc., id.* The Seventh Amendment to the Constitution of the United States prohibits federal courts from re-examining any facts tried by a jury in any other manner than according to rules of common law. *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364 (1913). When, as here, the plaintiff is negligent in presenting all of its claims, the court should not later entertain additional charges under the guise of "equitable relief."

Ohio-Sealy was injured by the conduct of the defendant and was entitled to compensation for the full breadth of damages suffered. Included in the injury was the loss of the purchase of three licenses: Florida, Philadelphia and Pittsburgh. Included in that loss was the full predictable value of future lost profits and other benefits which could reasonably accrue from ownership of the licenses.

It may be that plaintiff, as it explains, did not ask the jury for future damages because it felt that they could not then be predicted. However, plaintiff was able through the use of statistics effec-

tively to predict those future damages that were attributable to the period of time beginning at the date of loss of purchase to the date of verdict. The failure to include all other future damages was a unilateral act of plaintiff. In no way was Ohio-Sealy prevented by this Court from going further in its demand. Most compelling to note is the fact that the Court instructed the jury on making a full compensatory determination.[13]

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[13]The pertinent instructions given to the jury on April 1, 1975 were agreed to by both parties. These instructions are set out as follows:

(No. I-42: Damages—General Rules—Defendants' Objection (JT 8885) On the sole ground that portions of this instruction were repetitive of I-41).

(No. I-42): The purpose of damages in an antitrust suit is to put the plaintiff in as good a position as if the antitrust violations had not occurred. If you decide for plaintiff on the question of liability and injury you must then fix the amount of money which will reasonably and fairly compensate plaintiff for its damages. Antitrust damages, while not limited in kind, are generally of two types: lost profits and increased expenses of doing business.

While you should not simply guess as to the amount of damages, the fact that the precise amount of plaintiffs' damages may be difficult to ascertain does not prevent an award of damages, for it is not necessary to prove the amount of damages with precise mathematical accuracy. You are permitted to determine the amount of damages by estimate or approximation once a reasonable basis for doing so has been provided by the evidence. . . .

(No. I-47: Plaintiffs' damages—Agreed (JT8886) ). In this case Ohio-Sealy's claim for damages falls into eight categories:

First, loss of profits which would have been earned if Ohio-Sealy had not been prevented from acquiring other Sealy licensees.

Second, acquisition expenses incurred by Ohio-Sealy, the value of which was lost to Ohio-Sealy.

Third, loss of profits which would have been earned if Ohio-Sealy had not been delayed in the acquisition of other Sealy licensees.

Fourth, loss of profits which would have been earned had Ohio-Sealy not been denied an additional plant location.

Fifth, net pass-over payments and warranty repair charges paid by Ohio-Sealy.

*(Footnote continued on next page.)*

Plaintiff further argues that the remedy available at law is inadequate. This is not so. The principal authorities on speculative damages, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), make it clear that the rule precluding recovery of certain damages applies to damages which are not the certain result of the wrong. This rule does not apply to damages definitely attributable to a proven wrong and only uncertain as to the amount. *Bigelow* v. *RKO Radio Pictures, Inc., supra; Story Parchment Co.* v. *Paterson Parchment Paper Co., supra.* The precedent set by these cases has been consistently followed. *See, Jewel Tea Co.* v. *Amalgamated Meat Cutters and Butcher Workmen,* 274 F.2d 217 (7th Cir. 1960), *cert. denied,* 362 U.S. 936. Further, the cases hold that in the absence of precise proof, "[t]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct proof.' " *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 at 264 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 at 561-4 (1931); *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, at 377-9 (1927).

There is no doubt that lost future profits is an appropriate measure of damages and that in the case of injury to a going concern, those profits are ascertainable. *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); *Albrecht* v. *Herald Company,* 452 F.2d 124 (8th Cir. 1971). As stated above, when parties have determined the purchase price of

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*(Footnote continued from previous page.)*

In the instructions given there was no specification as to past, present or future damages. A general verdict was given by the jury based upon, *inter alia,* these instructions. Instructions Given and Verdict Forms Submitted, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243 (April 1, 1975). Reprinted in the U.S. Court of Appeals for the Seventh Circuit Joint Appendix, Vol. 2, p. 1252.

a going business, the prospect of future earnings is necessarily considered in arriving at the fair market value of that concern. Future profits are a principal element in a going concern value. *Lehrman* v. *Gulf Oil Corp., supra; Albrecht* v. *Herald Company, supra.*

I definitely am of the opinion that plaintiff had sufficient information and resources available at the time of trial, to enable the jury to make a just and reasonable determination as to Ohio-Sealy's past and future profit losses including everything resulting from being deprived of acquiring the three licenses. Not only had plaintiff entered into agreements with the Florida, Philadelphia and Pittsburgh licensees in order to secure their purchase, but, tendered $3,155,000, $2,500,000 and $2,800,000 respectively, toward that end.[14] It must be assumed that during the course of negotiations, the future profit earning potential of the licensee must have been an element in determining the purchase price of each. *Albrecht* v. *Herald Company, supra* at 129. Further, defendant made available to the plaintiff the income statements of each of the licensees in question from which plaintiff prepared "estimated minimum lost profits" statements and could have made projections of all of the future profits.[15]

Ohio-Sealy contends that unless divestiture were ordered and the three licensees sold to it, plaintiff would never be fully compensated for future lost profits. Plaintiff suggests that in order to recover lost future profits, it would have to bring suits periodically, whenever damages would become reasonably certain. In *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976), a case whose facts are similar to those in the instant

[14]Exhibits, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243. PTX 390, 69 Rec., PTX 396, 69 Rec., PTX 399, 60 Rec.

[15]Exhibits, *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, No. 71 C 1243. Reprinted in the U.S. Court of Appeals for the Seventh Circuit Joint Appendix, Vol. 1. PTX 433A, pp. 419-24; PTX 433B, pp. 425-31; PTX 433C, pp. 433-34.

case, plaintiff, Telecasters, charged the Jefferson-Pilot Corp. with engaging in a continuing conspiracy with members of the City Council of Charlotte, North Carolina, to prevent the award of a franchise to the applicant in which Telecasters had an interest. In the action, commenced in 1971, Telecasters attempted to take advantage of the holding in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), which created an exception to the statute of limitations. The plaintiff alleged that at the time the city council awarded the franchise, 1967, it could not ascertain its loss of future profits with sufficient certainty to sustain a jury verdict. The plaintiff in *Charlotte Telecasters*, cited *Zenith* for the proposition that a cause of action for future damages does not accrue until the damages become reasonably ascertainable and, therefore, capable of proof. The Fourth Circuit, however, held that *Zenith* did not prescribe new standards for determining whether damages, once ascertained are too speculative to permit recovery. In finding that Telecasters could have sustained an action at the time of the last overt act, in 1977, the Court cited *Bigelow* v. *RKO Radio Pictures, Inc., supra*, and *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra*. In holding as they did, the Fourth Circuit determined that if, at the time of injury, plaintiff is able to relate its harm to the wrong complained of, direct proof of damages is not necessary. *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp., supra* at 573.

It should be noted that *Zenith* did address the issue of "continuing conspiracy" to violate the antitrust laws. To borrow from the holding:

> [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act. . . . However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of the accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. Thus, if a plaintiff

> feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. *Zenith Radio Corp.* v. *Hazeltine Research*, 401 U.S. 321, 338–39 (1971).

Clearly, the Court in *Zenith* was concerned with separate acts in violation of the antitrust laws, and was not sanctioning multiple suits for the recovery of future damages stemming, as it seems in this case, from completed transactions. The antitrust laws are not intended to give a life annuity in addition to actual damages suffered in a business transaction. *Albrecht* v. *Herald Company*, 452 F.2d 124, 131 (8th Cir. 1971). In this case, plaintiff must be deemed to have waived any claim for future lost profits on the Florida, Philadelphia and Pittsburgh transactions that might accrue subsequent to the trial of the case.

In its final attempt to persuade this Court to order divestiture, plaintiff directed attention to *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948). *Schine* held that in requiring divestiture, like restitution, it merely deprived the defendant of gains from its wrongful conduct. *Id.* at 128. However, an important fact not mentioned by defendant is that the court in *Schine* did not require the defendants to pay money damages. Congress expressly provided under Section 4 of the Clayton Act, § 15 U.S.C. § 15, for actual damages as a compensatory or remedial recovery.

In reversing the decision of the district court in *International Telephone and Telegraph Corp.* v. *General Telephone and Electronics Corp.*, the Ninth Circuit held that divestiture is not an available remedy in private actions under § 16 of the Clayton Act. *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975). In preparing its decision the appellate court conducted a comprehensive study of the legislative history supporting the intended

use of Section 16 of the Act. It thereupon determined that when Congress enacted the injunctive relief provision of Section 16, it did not intend to create a private divestiture remedy. *Id.* at 920 *et seq.* The analysis presented by the Ninth Circuit is definitive. However, case authority on the issue is divergent[16] and a number of other courts have declined to address the issue directly. Instead of deciding a rule of general application, each approached the question of whether to grant divestiture to a private plaintiff under Section 16 of the Act on the basis of an assessment of the facts peculiar to their case.

In *International Telephone & Telegraph*, the facts were very similar to those in the instant case. The district court found that the General Telephone & Electronics acquisitions of telephone operating companies, in conjunction with its ownership and operation of a manufacturing subsidiary, effected a foreclosure of competition in the telephone equipment manufacturing industry sufficient to violate the federal antitrust law. The appellate court held that divestiture was unavailable to a private plaintiff. At the same time it stated that injunctive remedies under Section 16 of the Clayton Act may be as broad as necessary to ensure that "threatened loss or damage" not materialize and that prior violations not recur. *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp., supra* at 925. I agree that those are two of the attendant objectives of the Clayton Act in providing for equitable relief and that the purpose of the injunctive relief provision is to effect an end to on-going violations of the antitrust law.

I find that the injunctive relief fashioned in today's order is sufficient to end any procedures which would permit Sealy, Inc., through use of its licensing agreement, to continue actions violative of antitrust laws. The decree will prevent the use of illegal

[16]See, *NBO Industries Treadway Cos. Inc.* v. *Brunswick Corp.*, 523 F.2d 262 at 278 n. 17 (3d Cir. 1975); *vacated on other grounds sub nom. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

tying arrangements; it will prohibit the use of product service repair charges and pass-over payments; and, it will eliminate the limitations of the plant location clause. Further, by ordering that the right of first refusal be enjoined whenever it is exercised to promote an anticompetitive purpose I will be providing the plaintiff the protection expected under the law.

## SUMMARY

In order that the decree which I am about to enter is clearly understood by the parties, I will set out below a summary of my observations.

1. This case was sent back to me for the granting of "equitable relief", after a finding by a jury that the defendant had violated the antitrust laws by engaging in a scheme of market allocation involving one or more wrongful acquisitions of its licensees in derogation of the right of plaintiff to freely engage in horizontal competition. *Ohio-Sealy* v. *Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978). In its decision the Court of Appeals determined the following, and such determinations are controlling at this time:

a. The arrangements of the Sealy Organization were horizontal ones, and any restraints applied to the independent businesses of licensees result directly from the concerted actions of horizontal potential competitors.

b. Areas of primary responsibility, exclusive manufacturing location clauses, pass-over payments, and rights of first refusal can, standing alone or in conjunction, violate the antitrust laws when incorporated into a conspiracy to restrain trade.

c. Because of the fact that the mattress business is substantially local in nature, exclusive manufacturing territories tend to have the effect of limiting to some degree the areas in which a licensee can effectively compete. This sets the stage for preventing aggressive licensees like the plaintiff from competing effectively against neighboring licensees.

d. The degree to which Sealy licensees can effectively compete with each other from fixed central locations is reduced by the contract clause which allows Sealy to deny Ohio-Sealy its request to locate plants near the periphery of its APR. Sealy further di[illegible]uraged intrabrand competition by imposing charges on [illegible] APR sales such as pass-over payments, and product service repair charges.

e. Sealy used the right of first refusal provision in the licensing contract against Ohio-Sealy to stop Ohio-Sealy from engaging in intrabrand competition.

f. Ohio-Sealy's lost profit damages resulting from Sealy's acquisition of the Florida, Pittsburgh and Philadelphia licenses established that compensation for those lost profits was a part of the jury's verdict.

g. The evidence established that Sealy forced its licensees to purchase mattress parts from designated suppliers from whom Sealy collected a charge of from three to five percent, unbeknownst to the licensees. The designated suppliers passed this charge on to be paid for by the licensees. There is no illegal tying arrangement where the tying company has absolutely no financial interest in the sales of the third company, but where these interests were concealed from the licensees in order to hide from a captive market a handsome premium, such an arrangement is unlawful.

h. Ohio-Sealy was unable to make a case of illegality out of Sealy's national accounts program.

i. Injunctive relief under Section 16 of the Clayton Act is characteristically available as long as the plaintiff is able to demonstrate a significant threat of injury from an impending violation of the antitrust laws or from an ongoing violation that is likely to continue or recur. Where equitable relief is sought, the court must make findings not inconsistent with or contrary to the jury's resolution of issues implicit in its verdict. It is mathematically certain here that at least one of Sealy's first refusal acquisitions violated the antitrust laws and that it was the use of the right of first refusal in conjunction with other practices to maintain market allocation that brought about a violation of the law.

j. Upon remand I should bear in mind that once a violation is established, as at least one is here, I may properly enjoin the defendant from other unlawful acts also. Although the Court of Appeals expressed no view as to Ohio-Sealy's request for divestiture, I should at least consider this issue along with all others in deciding what total mix of equitable relief, if any, might be just under the circumstances such relief not being foreclosed simply by Ohio-Sealy's having received damages for past lost profits.

2. In going into the matter of equitable relief I am free to consider all of the evidence addressed in the jury trial as well as additional evidence. The additional testimonial evidence which has been presented consisted principally of a reiteration by the expert, Dr. Mueller, of the positions he had taken in his earlier testimony, and testimony from members of the new independent board of directors of Sealy, which without contradiction, except by Dr. Mueller's general belief that Sealy's board cannot really be independent, established that the present board is made up primarily of men of stature and experience, capable of making independent economic and legal business decisions.

3. I have been kept up to date as to other litigation brought by Ohio-Sealy against Sealy. In particular, I have reviewed the charge that with regard to the Portland license Sealy violated antitrust laws by its exercise of the right of first refusal; and, the finding of another court that the Hoover Ball and Bearing Company conspired with Sealy in violating the antitrust laws with relation to an arrangement in which Sealy licensees were required to purchase Hoover components for which requirement Hoover rebated to Sealy a percentage of its sales. Within the last few days it has been brought to my attention that in the *Duncan* case, Ohio-Sealy seeks to enjoin Sealy from revoking its license because of Ohio-Sealy's threat to manufacture Sealy brand bedding in plants it has acquired or is in the process of acquiring inside APR's of other licensees.

None of these cases is before me for decision, nor should they be. The trial of this case was concluded in 1975, and the equitable relief I fashioned must be founded upon the findings of the jury that heard this case. Today's decree may have some effect upon later cases indirectly, but it should not be my purpose here to influence decisions yet to be made. Later decisions should be free to rest upon the facts peculiar to the cases in which they will be made.

4. Sealy asserts that under the present state of the pleadings, evidence and arguments presented any and all practices found unlawful, including the plant location clause of the licensing agreement of 1975, the provisions for product service repair charges and passover payments, provisions forbidding a licensee from owning an interest in a vertically competing bedding manufacturer, and the receipt of rebates and commissions from suppliers of parts, have been discontinued. However, Sealy agrees and requests to be enjoined from engaging in such practices.

5. The problem giving rise to equitable relief for Ohio-Sealy originates in the strategy followed by Sealy in its battle to prevent Ohio-Sealy from dominating or attempting to dominate the Sealy industry. Since 1969, Sealy has sought a procedure wherewith it could change its structure from a licensor-licensee operation (with the licensees combining to be their own licensor) to a single privately owned corporation with its licensees owning its stock. No firm program in that direction has yet developed, but there has been substantial progress in that direction. Sealy now owns 30% of its licenses, having acquired them one at a time as they have become available for purchase.

Sealy has developed under one corporate structure two personalities. In one instance, Sealy is in the business of purchasing licenses, a business in which Ohio-Sealy should be able to compete freely. Ohio-Sealy should not be restrained by Sealy through the use of licensing contract clauses in a manner that runs afoul of

the antitrust laws. Characteristic of its other personality, Sealy, the parent-licensor, has a proprietary interest in, and a duty to its licensees to protect the Sealy brand, its patents, copyrights, trademarks, trade names, slogans, processes and know-how against any efforts of Ohio-Sealy that directly or indirectly would appropriate those proprietary interests to itself under the shelter of antitrust law.

The Sealy matter is unique among antitrust cases because of the nature of the mattress business and the economics which indicate that there must be proximity between the manufacture and distribution of bedding. As witnesses for both sides have made clear, the distance between the manufacture and the sale of mattresses must be relatively small, and even where population is dense, intrabrand competition can actually reduce the quality of interbrand competition and thereby threaten the high position Sealy holds in the general mattress market. As long as Sealy remains in this transition period there will continue the temptation for Sealy, the licensor, to use its licensing contract as a weapon, thereby giving itself as an intrabrand competitor an improper advantage.

Under these circumstances the Court must use its equity powers with surgical skill in order to curb any insidious anticompetitive conduct on the part of Sealy, and at the same time to preserve to the proper use of Sealy, the licensor, those property rights the antitrust laws were not intended to injure.

## DECREE

For the reasons set out above, it is hereby decreed and ordered as follows:

1. Defendant is enjoined and restrained from enforcing the Product Service Repair Charge provision set forth in Section VII, Paragraph G of the 1975 Sealy Uniform U.S. License Contract or any variation thereof.

2. Defendant is enjoined and restrained from enforcing the Pass-Over Payments provision set forth in Section VII of the 1975 Sealy Uniform U.S. License Contract or any variation thereof.

3. Defendant is enjoined from enforcing the plant location provision or any part or variation thereof in its licensing agreement which prohibits a Sealy licensee from locating a manufacturing plant to manufacture "Sealy Products" at any location it chooses within such licensee's "Area of Primary Responsibility."

4. Defendant is enjoined and restrained from enforcing any license provision or any part or variation thereof in its licensing agreement which forbids a licensee or any of its stockholders from owning an interest in any interbrand competitive organization or from manufacturing bedding products competitive with Sealy product.

Nothing in this decree shall preclude Sealy from enforcing and including in its license agreement reasonable provisions that serve to protect Sealy's interest in its trademarks, trade names, trade secrets, inventions, process, program improvements and other confidential information, and that insure full and complete performance of a licensee's obligation to promote the sale of Sealy products, as long as such provision(s) shall not unreasonably interfere with the ability of plaintiff to effectively compete inside or outside its existing areas of primary responsibility by acquiring or establishing and operating in any location non-Sealy mattress plants.

5. Defendant is enjoined and restrained from requesting and/or receiving any payments from persons supplying products to Sealy licensees, and in particular products which are required by mandatory specifications issued by Sealy.

6. Defendant is enjoined and restrained from withholding approval upon a written request by any licensee for approval of any designated supplier of component parts for Sealy products should that supplier meet fully the same objective standards of quality and design required by Sealy of all other Sealy suppliers. Further, defendant is enjoined and restrained from receiving any payment of money with respect

to an approved supplier's sales of components to Sealy licensees.

Provisions 5 and 6 above do not prevent Sealy from requiring as a mandatory specification the use of a particular component part or a design or type which, for reasons beyond Sealy's control, is available from only a single supplier.

7. Defendant is hereby enjoined and restrained from withholding from a licensee who wishes to sell, or transfer, or dispose of its license, separately or as part of the sale of substantially all of its assets or business, approval to do so when the proposed transferee meets the objective standards set forth in Section XI, Paragraph B, Subparagraph 3(a) of the 1975 Uniform License Contract.

Further, defendant is enjoined and restrained from enforcing that clause in Section XI, Paragraph B subparagraph 3(a) or any variation thereof which operates to make competition for customers served by Sealy licensees an objective standard to be employed by Sealy in withholding from a licensee approval to sell, transfer or dispose of its license.

8. Defendant is enjoined and restrained from exercising the option of the right of first refusal provided by Section XI, Paragraph B, Subparagraph (3)(b) when the exercise of it is intended to promote any anticompetitive purpose, or is merely in furtherance of the business interests of a licensee owned by Sealy, or singularly by any other licensee.

Nothing in this decree shall preclude Sealy from otherwise exercising the right of first refusal.

9. Defendant is not by this decree and order otherwise prohibited from enforcing the Exclusive Manufacturing provision as set forth in Sealy's Covenants and Agreements, Section III, Paragraph A of the 1975 Uniform License Contract.

10. No order of divestiture as to the Florida, Philadelphia and Pittsburgh licenses will issue by this decree.

11. Jurisdiction is retained for the sole purpose of implementing and enforcing this Decree after the conclusion of any proceedings which may be taken on appeal from this order.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 1243

OHIO-SEALY MATTRESS MFG. CO.,
et al., *Plaintiffs,*

V.

SEALY, INC., et al., *Defendants.*

MINUTE ORDER

(MARCH 17, 1981)

Order the following changes in the Memorandum Opinion and Order of March 6, 1981: Page 4, line 6 continuing on to line 7, delete phrase "in what now I find to be a manner violative of the antitrust laws." End sentence after the word "acquired". Page 4, second paragraph, line 4, change the word "agreed" to "volunteered". Page 4, beginning third line from end, change to read "This differs from the divestiture issue." (deleting the remainder of sentence). Page 5, beginning with last word on line 8, delete entire sentence that begins with the word "probably". Also, delete that part of the next sentence that begins with the word "Since" and ends with the word "proceedings". Change the comma following the word "proceedings" to a period and begin the remainder of the sentence with a capital "I" in the word "it". Page 6, line 11, change the word "effect" to the word "affect".

# UNITED STATES v. SEALY, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 9. Argued April 20, 1967.—Decided June 12, 1967.

MR. JUSTICE FORTAS delivered the opinion of the Court.

Appellee and its predecessors have, for more than 40 years, been engaged in the business of licensing manufacturers of mattresses and bedding products to make and sell such products under the Sealy name and trademarks. In this civil action the United States charged that appellee had violated § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, by conspiring with its licensees to fix the prices at which the retail customers of the licensees might resell bedding products bearing the Sealy name, and to allocate mutually exclusive territories among such manufacturer-licensees.

After trial, the District Court found that the appellee was engaged in a continuing conspiracy with its manufacturer-licensees to agree upon and fix minimum retail prices on Sealy products and to police the prices so fixed. It enjoined the appellee from such conduct, "Provided, however, that nothing herein contained shall be construed to prohibit the defendant from disseminating and using suggested retail prices for the purpose of national advertising of Sealy products." Appellee did not appeal the finding or order relating to price-fixing.

With respect to the charge that appellee conspired to allocate mutually exclusive territory among its manufacturers, the District Court held that the United States had not proved conduct "in unreasonable restraint of trade in violation of Section 1 of the Sherman Act." The United States appealed under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction. 382 U. S. 806 (1965).

There is no dispute that exclusive territories were allotted to the manufacturer-licensees. Sealy agreed with each licensee not to license any other person to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell "Sealy products" outside the designated area. A manufacturer could make and sell his private label products anywhere he might choose.

Because this Court has distinguished between horizontal and vertical territorial limitations for purposes of the impact of the Sherman Act, it is first necessary to determine whether the territorial arrangements here are to be treated as the creature of the licensor, Sealy, or as the product of a horizontal arrangement among the licensees. *White Motor Co.* v. *United States,* 372 U. S. 253 (1963).

If we look at substance rather than form, there is little room for debate. These must be classified as horizontal restraints. Compare *United States* v. *General Motors,* 384 U. S. 127, 141-148 (1966); *id.,* at 148-149 (HARLAN, J., concurring in the result); *United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (1960).

There are about 30 Sealy "licensees." They own substantially all of its stock.[1] Sealy's bylaws provide that each director must be a stockholder or a stockholder-licensee's nominee. Sealy's business is managed and controlled by its board of directors. Between board meetings, the executive committee acts. It is composed of Sealy's president and five board members, all licensee-stockholders. Control does not reside in the licensees only as a matter of form. It is exercised by them in the day-to-day business of the company including the grant, assignment, reassignment, and termination of exclusive territorial licenses. Action of this sort is taken either by the board of directors or the executive committee

[1]A nonlicensee, Bergmann, who was Sealy's president in the 1950's, owns some of the remaining stock; stockholders have preemptive rights.

of Sealy, both of which, as we have said, are manned, wholly or almost entirely, by licensee-stockholders.

Appellee argues that "there is no evidence that Sealy is a mere creature or instrumentality of its stockholders." In support of this proposition, it stoutly asserts that "the stockholders and directors wore a 'Sealy hat' when they were acting on behalf of Sealy." But the obvious and inescapable facts are that Sealy was a joint venture of, by, and for its stockholder-licensees; and the stockholder-licensees are themselves directly, without even the semblance of insulation, in charge of Sealy's operations.

For example, some of the crucial findings of the District Court describe actions as having been taken by "stockholder representatives" acting as the board or a committee.

It is true that the licensees had an interest in Sealy's effectiveness and efficiency, and, as stockholders, they welcomed its profitability—at any rate within the limits set by their willingness as licensees to pay royalties to the joint venture. But that does not determine whether they as licensees are chargeable with action in the name of Sealy. We seek the central substance of the situation, not its periphery;[2] and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats. The arrangements for exclusive territories are necessarily chargeable to the licensees of appellee whose interests such arrangements were supposed to promote and who, through select members, guaranteed or withheld and had the power to terminate licenses for inadequate performance. The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers

[2]Cf., *e. g.*, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *United States* v. *General Motors*, 384 U. S. 127 (1966); *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371 (1952); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911).

as incident to the sale of a trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal.

Accordingly, this case is to be distinguished from *White Motor Co.* v. *United States, supra,* which involved a vertical territorial limitation. In that case, this Court pointed out that vertical restraints were not embraced within the condemnation of horizontal territorial limitations in *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951), and, prior to trial on summary judgment proceedings, the Court declined to extend *Timken* "to a *vertical* arrangement by one manufacturer restricting the territory of his distributors or dealers." 372 U. S., at 261.

*Timken* involved agreements between United States, British, and French companies for territorial division among themselves of world markets for antifriction bearings. The agreements included fixing prices on the products of one company sold in the territory of the others; restricting imports to and exports from the United States; and excluding outside competition. This Court held that the "aggregation of trade restraints such as those existing in this case are illegal under the [Sherman] Act." 341 U. S., at 598.

In the present case, we are also faced with an "aggregation of trade restraints." Since the early days of the company in 1925 and continuously thereafter, the prices to be charged by retailers to whom the licensee-stockholders of Sealy sold their products have been fixed and policed by the licensee-stockholders directly, by Sealy itself, and by collaboration between them. As the District Court found:

> "the stockholder-licensee representatives . . . as the board of directors, the Executive Committee, or other committees of Sealy, Inc. . . . discuss, agree upon and set

"(a) The retail prices at which Sealy products could be sold;

"(b) The retail prices at which Sealy products could be advertised;

"(c) The comparative retail prices at which the stockholder-licensees and the Sealy retailers could advertise Sealy products;

"(d) The minimum retail prices below which Sealy products could not be advertised;

"(e) The minimum retail prices below which Sealy products could not be sold; and

"(f) The means of inducing and enforcing retailers to adhere to these agreed upon and set prices."

These activities, as the District Court held, constitute a violation of the Sherman Act. Their anticompetitive nature and effect are so apparent and so serious that the courts will not pause to assess them in light of the rule of reason. See, *e. g., United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 210-218 (1940); *United States* v. *General Motors,* 384 U. S. 127, 147 (1966).

Appellee has not appealed the order of the District Court enjoining continuation of this price-fixing, but the existence and impact of the practice cannot be ignored in our appraisal of the territorial limitations. In the first place, this flagrant and pervasive price-fixing, in obvious violation of the law, was, as the trial court found, the activity of the "stockholder representatives" acting through and in collaboration with Sealy mechanisms. This underlines the horizontal nature of the enterprise, and the use of Sealy, not as a separate entity, but as an instrumentality of the individual manufacturers. In the second place, this unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of

trademark licensing. Cf. *Timken Roller Bearing Co.* v. *United States, supra.*[3] The territorial restraints were a part of the unlawful price-fixing and policing. As specific findings of the District Court show, they gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions. It may be true, as appellee vigorously argues, that territorial exclusivity served many other purposes. But its connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint and that appellee be effectively prevented from its continued or further use.

It is urged upon us that we should condone this territorial limitation among manufacturers of Sealy products because of the absence of any showing that it is unreasonable. It is argued, for example, that a number of small grocers might allocate territory among themselves on an exclusive basis as incident to the use of a common name and common advertisements, and that this sort of venture should be welcomed in the interests of competition, and should not be condemned as *per se* unlawful. But condemnation of appellee's territorial arrangements certainly does not require us

[3]In *Timken,* as in the present case, it was argued that the restraints were reasonable steps incident to a valid trademark licensing system. But the Court summarily rejected the argument, as we do here. It pointed out that the restraints went far beyond the protection of the trademark and included nontrademarked items, and it concluded that: "A trademark cannot be legally used as a device for a Sherman Act violation." 341 U. S., at 599. Cf. § 33 of the Lanham Act, 60 Stat. 438, as amended, 15 U. S. C. § 1115 (b) (7). In *Timken,* the restraints covered nonbranded merchandise as well as the "Timken" line. In the present case the restraints were in terms of "Sealy products" only. As to their private label products, the licensees were free to sell outside of the given territory and, so far as appears, without resale price collaboration or enforcement. But this difference in fact is not consequential in this case. A restraint such as is here involved of the resale price of a trademarked article, not otherwise permitted by law, cannot be defended as ancillary to a trademark licensing scheme. Cf. also *United States* v. *General Motors,* 384 U. S. 127, 142-143 (1966).

to go so far as to condemn that quite different situation, whatever might be the result if it were presented to us for decision.[4] For here, the arrangements for territorial limitations are part of "an aggregation of trade restraints" including unlawful price-fixing and policing. *Timken Roller Bearing Co.* v. *United States, supra,* 341 U. S., at 598. Compare *United Sates* v. *General Motors,* 384 U. S. 127, 147-148 (1966).[5] Within settled doctrine, they are unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness.

Accordingly, the judgment of the district Court is reversed and the case remanded for the entry of an appropriate decree.

MR. JUSTICE CLARK and MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE HARLAN, dissenting.

I cannot agree that on this record the restrictive territorial arrangements here challenged are properly to be classified as "horizontal," and hence illegal *per se* under established antitrust doctrine. I believe that they should be regarded as "vertical" and

[4] Cf. *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 6-7 (1958): "As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

[5] MR. JUSTICE HARLAN observed, concurring in the result in *United States* v. *General Motors,* 384 U. S. 127, 148-149, that "Although *Parke Davis* related to alleged price-fixing, I have been unable to discern any tenable reason for differentiating it from a case involving, as here, alleged boycotting." The same conclusion would seem to apply with respect to an alleged market division, which, like price-fixing, group boycotts, and tying arrangements, has been held to be a *per se* violation of the Sherman Act. *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958).

thus, as the Court recognizes, subject to different antitrust evaluation.

Sealy, Inc., is the owner of trademarks for Sealy branded bedding. Sealy licenses manufacturers in various parts of the country to produce and sell its products. In addition, Sealy provides technical and managerial services for them, conducts advertising and other promotional programs, and engages in technical research and quality control activities. The Government's theory of this case in the District Court was essentially that the allocation of territories by Sealy to its various licensees was unlawful *per se* because in spite of these other legitimate activities Sealy was actually a "front" created and used by the various manufacturers of Sealy products "to camouflage their own collusive activities. . . ." Plaintiff's Brief in Opposition to Defendants' Briefs, October 12, 1961, pp. 12, 15.

If such a characterization of Sealy had been proved at trial I would agree that the division of territories is illegal *per se*. Horizontal agreements among manufacturers to divide territories have long been held to violate the antitrust laws without regard to any asserted justification for them. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *United States* v. *National Lead Co.*, 332 U. S. 319; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593. The reason is that territorial divisions prevent open competition, and where they are effected horizontally by manufacturers or by sellers who in the normal course of things would be competing among themselves, such restraints are immediately suspect. As the Court noted in *White Motor Co.* v. *United States*, 327 U. S. 253, 263, they are "naked restraints of trade with no purpose except stifling of competition." On the other hand, vertical restraints—that is, limitations imposed by a manufacturer on his own dealers, as in *White Motor Co., supra*, or by a licensor on his licensees—may have independent and valid business justifications. The person imposing the restraint cannot necessarily

be said to be acting for anticompetitive purposes. Quite to the contrary, he can be expected to be acting to enhance the competitive position of his product *vis-à-vis* other brands.

With respect to vertical restrictions, it has long been recognized that in order to engage in effective *interbrand* competition, some limitations on *intrabrand* competition may be necessary. Restraints of this type "may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (cf. *Brown Shoe* [v. *United States*, 370 U. S. 294], at 330; *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 560-561, aff'd, 365 U. S. 567) and within the 'rule of reason,' " *White Motor Co., supra*, at 263; see also *id.*, at 267-272 (concurring opinion of BRENNAN, J.). For these reasons territorial limitations imposed vertically should be tested by the rule of reason, namely whether in the context of the particular industry, "the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. Indeed the Court reaffirms these principles in the opinion which it announces today in *United States* v. *Arnold, Schwinn & Co., post*, p. 365.

The question in this case is whether Sealy is properly to be regarded as an independent licensor which, as a prima facie matter, can be deemed to have imposed these restraints on its licensees for its own business purposes, or as equivalent to a horizontal combination of licensees, that is as simply a vehicle for effectuating horizontal arrangements between its licensees. On the basis of the findings made by the District Court, I am unable to accept the Court's classification of these restraints as horizontally contrived. The District Court made the following findings:

> "84. The preceding [detailed factual] findings indicate the type of evidence in this record that demonstrates that there has never been a central conspiratorial purpose on the

part of Sealy and its licensees to divide the United States into territories in which competitors would not compete. Their main purpose has been the proper exploitation of the Sealy name and trademarks by licensing bedding manufacturers to manufacture and sell Sealy products in exchange for royalties to Sealy. The fact remains that each licensee was restricted in the territory in which he could manufacture and sell Sealy products. However, the record shows that this restriction was imposed by Sealy and was also secondary, or ancillary, to the main purpose of Sealy's license contracts.

"119. Plaintiff's evidence, read as a whole, conclusively proves that the Sealy licensing arrangements were developed in the early 1920's for entirely legitimate business purposes, including royalty income to Sugar Land Industries, which owned the Sealy name, trademarks and patents, and the benefits to licensees of joint purchasing, research, engineering, advertising and merchandising. These objectives were carried out by successor companies, including defendant, whose activities have been directed not toward market division among licensees but toward obtaining additional licensees and more intensive sales coverage."

The Solicitor General in presenting the appeal to this Court stated explicitly that he did *not* contend "that Sealy, Inc. was no more than a facade for a conspiracy to suppress competition," Brief, p. 12, since it admittedly did have genuine and lawful purposes. For me these District Court findings, which the Government accepts for purposes of this appeal, take this case out of the category of horizontal agreements, and thus out of the *per se* category as well.[1] Sealy has wholly legitimate interests and purposes of its own: it is engaged in vigorous interbrand competition with

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[1]Compare *United States* v. *General Motors*, 384 U. S. 127, where the undisputed facts as found by the District Court, *id.*, at 140-141, proved a horizontal conspiracy among Chevrolet dealers to initiate and police a boycott of sales by dealers to discount houses. It is precisely because no such horizontal impetus was shown to exist here that I view this case differently. See my opinion concurring in the result in *General Motors*, 384 U. S., at 148.

large integrated bedding manufacturers and with retail chains selling their own products.[2] Sealy's goal is to maximize sales of its products nationwide, and thus to maximize its royalties. The test under such circumstances should be the same as that governing other vertical relationships, namely, whether in the context of the market structure of this industry, these territorial restraints are reasonable business practices, given the true purposes of the antitrust laws. See *White Motor Co., supra; Sandura Co.* v. *FTC*, 339 F.2d 847. It is true that in this case the shareholders of Sealy are the licensees. Such a relationship no doubt requires special scrutiny.[3] But I cannot agree that this fact by itself *automatically* requires striking down Sealy's policy of territorialization. The correct approach, in my view, is to consider Sealy's corporate structure and decision-making process as one (but only one) relevant factor in determining whether the restraint is an unreasonable one. Compare *United States* v. *Penn-Olin Chem. Co.*, 378 U. S. 158, 170.

The Court in reaching its result relies heavily on the fact that these territorial limitations were part of "an 'aggregation of trade

[2]The District Court made no findings as to the position of Sealy in the bedding industry, but on the basis of testimony introduced and not seriously contravened it appears that Sealy products are by no means the largest selling bedding products, that Sealy manufacturers have many competitors both nationwide and local, and that advertising—particularly nationwide advertising—is an important competitive factor in the industry.

[3]The Sealy trademark was originally owned by Sugar Land Industries, and its products were manufactured by a subsidiary, Sealy Mattress Co. In the 1920's independent manufacturers were licensed to produce Sealy products, and in 1925 Sugar Land sold the trademarks to a new corporation, Sealy Corp., owned by one E. E. Edwards and the various Sealy licensees. In 1933, when the economic depression eliminated a number of Sealy producers, the corporation was reorganized into the present Sealy, Inc. At present there are about 30 licensees owning approximately 90% of the stock. This joint-venture approach was created and maintained, the District Court found, "for entirely legitimate business purposes," such as obtaining the benefits "of joint purchasing, research, engineering, advertising and merchandising." Finding 119.

restraints,' " *ante,* p. 354, because the District Court has held that appellee did violate the Sherman Act by engaging in unlawful price fixing. "The territorial restraints," the Court says, "were a part of the unlawful price-fixing and policing," *ante,* p. 356. Nothing, however, in the findings of the District Court supports this conclusion. Indeed, the opposite conclusion is the more tenable one since the District Court that found Sealy guilty of price fixing found at the same time that it had not unlawfully conspired to allocate territories. The Government has not contended here that it is entitled to an injunction against territorial restrictions as a part of its relief in the price-fixing aspect of the case. The price-fixing issue was not appealed to this Court, and we can assume that the Government will obtain adequate and effective injunction relief from the District Court. For these reasons the Court's "aggregation of trade restraints" theory seems to me ill-conceived.

I find nothing in the Court's opinion that persuades me to abandon the traditional "rule of reason" approach to this type of business practice in the context of the facts found by the trial court. The District Court, however, made no findings in respect to this theory for judging liability since the Government insisted on trying the case in *per se* terms, attempting to prove only a horizontal conspiracy. Although Sealy did introduce some evidence concerning the bedding industry, the territorialization issue was not tried in the terms of the reasonableness of the territorial restrictions. A motion to suppress Sealy's subpoena seeking discovery with respect to one of its leading competitors was successfully supported by the Government,[4] and no evidence directly aimed at justifying

[4] See *United States* v. *Serta Associates, Inc.,* 29 F. R. D. 136, where in a companion action against another licensor of bedding products a similar subpoena was quashed after it was opposed by the Government. The District Court there noted: "The complaint alleges price fixing and market allocations by Serta, which it has denied. Defendant alleges the agreements made were reasonable ancillary restraints, valid under the Sherman Act, and the evidence sought by this subpoena would completely corroborate the reasonableness. The plaintiff, the Government, has

*(Footnote continued on next page.)*

territorial limitations as a reasonable method of competition in the bedding industry was taken. Accordingly, the District Court made no findings as to such justification.

Although in the normal course of things I would have voted to remand the case for further proceedings and findings under the correct rules of law, I believe that since the Government deliberately chose to stand on its *per se* approach, and did not prevail, it should not be able to relitigate the case on an alternative theory, especially when it opposed appellee's efforts to present the case that way.

I would affirm the dismissal of this aspect of the case by the District Court.

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*(Footnote continued from previous page.)*
also filed a brief supportive of the motion to quash the subpoena. It asserts that the complaint raises per se violations of the Sherman Act which fact renders completely irrelevant the subpoenaed material, tending to confirm the reasonableness of defendant's conduct."

SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA,
a California corporation,
et al., Plaintiffs, Counter-Defendants,

v.

SEALY, INC.,
a Delaware corporation, Defendant, Counter-Plaintiff.

No. 68 C 1390.

United States District Court,
N. D. Illinois, E. D.
June 19, 1972.

## MEMORANDUM OPINION AND ORDER

PARSONS, District Judge.

Recalling (1) the demeanor and intonations of the witnesses and (2) the persuasive impact of testimony and argument, the Court as trier of fact in this cause, has fitted the stream of conflicting statements of alleged facts into a pattern of evaluation and judgment; and is now ready to rule.

Plaintiffs Sealy Mattress Company of Southern California (Southern), a California corporation having its principal place of business in that state, Sealy Mattress Company of Northern California (Northern), a California partnership having its principal place of business in that state, and Seniel Ostrow, a California citizen, seek *inter alia* the deletion of certain sales restriction provisions from their present license contracts and the enforcement of the non-deleted remaining provisions of their license contract against Sealy, Inc. (Sealy), a Delaware corporation having its principal place of business in Illinois. The crux of the controversy is whether the Southern and Northern Sealy license contracts survived a 1960 civil antitrust suit filed in this District by the United States against Sealy, Inc., United States v. Sealy, Inc., 60 C 844 (*Sealy* antitrust case).

Jurisdiction is premised upon 28 U.S.C. §§ 1332 and 2201.

Responding to a United States Supreme Court mandate, the District Court (Austin, J.) entered a "Supplemental Final Judgment" holding *inter alia* that Sealy and its licensees had unlawfully agreed "to allocate territories for the sale of Sealy products." Sealy took the position that the impact of that holding was to render all of its then existing license contracts wholly void. Accordingly, Sealy demanded on May 31, 1968, that Southern and Northern sign new and different contracts within a sixty day time limitation or else their right to manufacture and sell under the Sealy trademark would be terminated. Plaintiffs refused to sign the new license contract and this declaratory judgment action followed.

In 1936 and 1937 the California manufacturers and Sealy entered into written "Manufacturer's Contracts" which obligated each manufacturer licensee to manufacture Sealy products in its allocated territory according to Sealy manufacturing specifications. The California manufacturers were restricted in their use of Sealy patents and designs to the manufacture and sale of Sealy products and to manufacture such products in accordance with Sealy processes, methods and directions. The contracts further provided for the use of the Sealy name and labels by the manufacturers in their advertising and promotion of Sealy products.

Reciprocal sales restriction provisions of the license contracts obligating the California manufacturers to restrict their sales of Sealy products to a specified area and prohibiting Sealy from selling or licensing in the same area were held invalid. The impact of that invalidity on the remainder of the contracts constitutes the area of disagreement between the parties.

Plaintiffs urge that the contracts survive with the invalid portions severed. It is defendant's position that the territo-

rial sales restrictions contained in the 1936 Southern license contract and the 1937 Northern license contract were of such vital importance to those contracts, that to cut them out would be to cut the very heart out of the agreements. Alternatively, Sealy contends that the franchise system created by the Sealy manufacturers is in the nature of a joint venture relationship that has developed over a period of years for the mutual advantage of all of the participants and that this lawsuit involves more than merely a contract between two persons. Involved is a contractual relationship evolved and developed by the parties over the years—a contractual *modus operandi* existing *de hors* the written 1936 and 1937 California license contracts. A licensee's election to be a part of the afore-described relationship imposes an obligation, enforceable in equity, to be bound by the same rules and contractual obligations as all other licensees; and that where the overwhelming majority of licensees have fixed upon a uniform, nondiscriminating method of determining royalties, it is Sealy's contention that it is the obligation of each participant to contribute his fair share on the same basis as all the others.

*In limine* it is to be noted that while Sealy now contends that plaintiffs' preantitrust judgment contracts are "void and of no further effect," Sealy's proposed new post-antitrust judgment contracts preserve those very void and no longer effective contractual rights to "any existing breach of said prior Contract" and further provides that the new agreement replaces the old only "from and after the date hereof."

The Sealy antitrust case judgment did not void the license contracts *in toto*. If the District Court had determined to void Sealy's license contracts, appropriate and simple language was at hand. See, for example, the decree involved in United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 77 S.Ct. 490, 1 L.Ed.2d 465 (1957), where license agreements had been decreed "illegal, null and void." All that the Supplemental

Final Judgment decree did was to order Sealy to require its licensees as a condition to the continuation or the issuance of any license to manufacture or sell products under any Sealy, Inc. trade name or trademark, that they file with the Court their consent to be bound by the terms of said judgment; and to cancel the licenses of those licensees who refused to file their consent to be bound. It is undisputed that the California licensees did consent to be so bound.

The District Court itself has in effect confirmed that the Supplemental Final Judgment did not automatically void the contracts and did not preclude severance. On October 10, 1968, Judge Austin advised the Executive Committee of this Court as follows (Letter dated October 10, 1968 from Hon. Richard B. Austin, United States District Judge, to the Executive Committee, on file in this case; see Tr. 110–16):

> " . . . I have given consideration to the possibility of retaining the case on the basis of the retention of jurisdiction clause in the judgment entered in 60 C 844. A reading of the complaint in 68 C 1390 (the instant case) shows that it is not brought for the purpose of securing compliance with or clarification of that judgment.
>
> "The alleged use by the defendant Sealy, Inc. of the judgment in 60 C 844 as a means of sanctioning its concellation of all franchise agreements and thus to engage in renegotiation of an entirely new franchise evokes principles of contract law and must be determined from the provisions of the franchise agreement itself. Admittedly reference to that judgment must be made to determine what conduct and activity had been proscribed, but such consideration must be made in the light of what the franchise or license agreement provide. Cf. Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29 (C.A. 7, 1960).
>
> "Insofar as the franchise agreements expressly contain clauses interdicted by the judgment in 60 C 844, the issue of divisibility of the contract must be governed by contract law;

and whether such franchise or license is intrinsically or in toto illegal because of the judgment in 60 C 844 is also dependent upon the terms of the agreement. No such element was involved in 60 C 844. The Supplemental Final Judgment in 60 C 844 (Part III, page 2) requires that a franchise or licensee

> 'as a condition to the continuation . . . of any franchise or license to manufacture or sell . . . file with the court . . . consent to be bound by the terms of the Final Judgment . . .'

and a failure to so file mandatorily requires the defendant Sealy, Inc. to cancel such franchise or license. The plaintiff here alleges it has filed its consent to be bound by that Judgment."

Judge Austin's clear expression that the Supplemental Final Judgment did not *ipso facto* void the license contracts forecloses argument to the contrary.

It is to be remembered that the very terms of the decree resulted from negotiations between the Government and Sealy. There is not the slightest indication that during the negotiations Sealy ever indicated to its licensees or anyone else that in Sealy's judgment the decree required, or even sanctioned, voiding the existing contracts and imposition of new ones. Much less was there any indication that any new contracts that might be offered would contain changes—including changes in the royalty and termination provisions—admittedly having nothing whatever to do with anything even remotely connected with the *Sealy* antitrust case.

Rather, the evidence is that Sealy—or at least its Board of Directors and licensees as distinguished from its officers—had not the remotest thought that the Supplemental Final Judgment would some day be used as a club to force new contracts on the licensees. Even I. L. (Irving) Fisher, the very Sealy Board member who made the December 6, 1967 motion authorizing

Sealy to consent to the Supplemental Final Judgment, had no inkling that Sealy would some day claim that the license contracts of "consenting manufacturers" (including his own) were thereby *ipso facto* rendered void.

Instead, Sealy Board minutes plainly reflect that only those licensees who might refuse to consent to the decree would lose their license contracts. The minutes state in pertinent part:

> "During the discussion it was again emphasized that all Sealy licensees will be obligated to sign the decree which will be presented; and Sealy, Inc. will be ordered to cancel the contract of any licensee who might refuse to do so."

The emphasis at the Sealy Board meeting that Sealy would only have "to cancel the contract of any licensee" who would not consent to be bound by the antitrust decree was entirely accurate. Sealy's post Supplemental Final Judgment view that the decree required new contracts was baseless. It did provide Sealy with the opportunity to impose a single uniform license on all Sealy manufacturers—a Sealy endeavor which had been underway for at least two decades.

As the evidence demonstrates, the *Sealy* antitrust case and the Government-Sealy negotiations leading to its formation simply did not compel cancellation of the license contracts. Even less did it give the slightest color of sanction for Sealy's overreaching attempt to compel the California manufacturers to sign new contracts that went far beyond the mere physical severance of the unlawful sales restrictions. Indeed, new contracts were not needed to eliminate the invalid sales restrictions, since arguably severance had already been accomplished by the combined force of the Supplemental Final Judgment and the severability clause contained in the license contracts.

Yet it was because of the changes in the new contract that were totally unrelated to the *Sealy* antitrust case—changes having to do with royalties, sales quotas, termination and the like—that the California manufacturers refused to sign the new contracts. Having nothing to do with the antitrust case, these changes imposed significantly new and additional burdens on the California licensees. Not only is there no basis in the Supplemental Final Judgment for Sealy's tactics, but the pre-antitrust-judgment licensee contracts themselves demonstrate that they survive with the sales restrictions severed.

Simply stated, the invalid sales restrictions are "severable by reason of the severability provision contained in the agreement." Buckeye Garment Rental Co. v. Jones, 276 F.Supp. 560, 562 (E.D.La.1967). "The agreement itself provides that if any part of the agreement is held to be void for any reason, the remainder of the contract will still be enforceable." Union Tank Car Co. v. Lindsay Soft Water Corp., 257 F. Supp. 510, 514 (D.Neb.1966). In their contracts Southern and Northern agreed with Sealy that, "this contract shall be deemed separable and if any portion hereof shall be held invalid for any reason, the remainder shall not thereby be invalidated but shall remain in full force and effect."

The severability clauses contained in the Sealy-Southern and Northern license contracts are plain and unambiguous. As the Court held in Standard Title Insurance Co. v. United Pacific Insurance Co., 364 F.2d 287, 289 (8th Cir. 1966):

> "If the contract is not ambiguous, then its provisions as written must be accepted without resort to any rules of interpretation and intent of the parties must be determined from the language used in the written contract."

See Founders' Insurance Co. v. Lanco Development Corp., 221 Cal.App.2d 503, 34 Cal.Rptr. 522 (2d Dist. 1963); Cimino v. Cimino. 93 Ill.App.2d 412, 236 N.E.2d 299 (1st Dist. 1968); Whiting Stoker Co. v. Chicago Stoker Corp., 171 F.2d 248 (7th Cir. 1948).

Under the most basic principles of contract, Sealy "cannot now be heard to claim, for its own benefit, that the actual undertaking of the parties was other than that which appears in their written agreement. . . . Even though it might prefer to have the court decide the plain effect of this agreement to be contrary to the expressed intention set forth in the contract between the parties, it is not within the power of the court to make a new or different contract." Osborne v. Locke Steel Chain Co., 153 Conn. 527, 218 A.2d 526 (1966).

The evidence disclosed that the territorial sales restrictions were under Government attack for many years, yet there was never the slightest suggestion from Sealy or the licensees that these restrictions of doubtful validity were exempt from the severability provisions that are part of every Sealy license contract.

There was never any indication that the severability provision did not apply to the challenged sales restrictions. There was never any comment that if these restrictions were held illegal the entire contract would be rendered void. There was never any effort to amend the severability provision to exclude from its ambit the sales restriction portions of the license contracts. There was never any oral statement hedging the plain scope of that provision. Neither Sealy nor any licensee attempted to limit the license contract by reserving an option to withdraw if the sales restrictions were declared invalid. There was no mention made to anyone that the severability provision did not mean exactly what it said. The lateness of the hour makes it most inappropriate for the severability provision to now undergo a change in meaning.

The invitation to rewrite or to ignore the severability provision has its genesis not in the Supplemental Final Judgment but in Sealy's desire to impose a uniform license contract on the California manufacturers. As the Supreme Court said in S S Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183, 79 S.Ct. 710, 712,

3 L.Ed2d 723 (1959), "In accordance with the familiar rule . . ., we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have."

Even absent a severability provision, whenever possible courts will enforce the valid parts of partially unlawful contracts. See e.g., Zajicek v. Koolvent Metal Awning Corp., 283 F.2d 127, 133 (9th Cir. 1960); Keene v. Harling, 61 Cal.2d 318, 38 Cal. Rptr. 513, 392 P.2d 273, 275 (1964); Joy Mfg. Co. v. Julian Petroleum Corp., 208 Cal. 168, 280 P. 952, 953 (1929). The Seventh Circuit is at the very forefront in enunciating the principle that whenever possible provisions found to violate the antitrust laws ought to be severed, with the remainder of the contract declared to remain in full force and effect even when the contract does not contain a severability clause. Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959), aff'g 257 F.2d 48 (7th Cir. 1958).

In the case at bar it is clear that an "intelligible economic transaction" (see *Kelly* Supreme Court holding, 358 U.S. at 521, 79 S.Ct. 429) remains after the illegal sales territorial provisions are severed from the California manufacturer-licensees' contracts.

For example, the obligation of the California manufacturers to manufacture Sealy products, the license to do so, Sealy's obligation not to license anyone else to manufacture in the territory, the California manufacturers' obligation to promote and attempt to fulfill the demand for Sealy products in their area, their obligation to meet Sealy's specifications, etc., all continue unabated. So too, the very significant obligation of the California manufacturers to pay royalties to Sealy persists undiminished.

The California licensees had only that which Sealy gave them and as the evidence disclosed, their understanding of what they were getting from Sealy was the right to use the Sealy tradename in the sale and manufacture of Sealy products in assigned terri-

tories. That right continues to exist and is found in Sealy's proposed new contracts.

As the evidence revealed the right to use the Sealy tradename was of primary importance to the licensee. The Kaplan testimony is not to the contrary. Because of his financial situation prior to becoming a Sealy licensee, the sales restriction provisions were most appealing to him. By contrast, the Fisher testimony was to the effect that not only were the sales restriction provisions of little concern to him but, indeed, he was not entirely pleased with his assigned territory—his feeling being that the assigned area was much too large for him to adequately handle economically. The Fisher and Ostrow testimony was to the effect that the central imperative for them as licensees was the purchased right to use the Sealy name.

There is no doubt that the territorial sales restrictions were a matter of life and death to Mr. Kaplan. Yet the sales restrictions merely accompanied his tradename. As the record will show Mr. Kaplan is still alive. He, Sealy, and the Sealy licensees not only live but as the record reveals they have prospered without the territorial sales restrictions. The heart of the license agreements is the right to use the Sealy tradename in the sale and manufacture of Sealy products in specified areas and that sale and manufacture territorialization remains in the present Sealy-California license contracts and is found in the Sealy proposed license contracts.

Applicable principles of antitrust law manifest a clear policy favoring the severance of invalid restrictions and the continued validity of the remainder of contracts. The governing antitrust principle is that "unless the Court, by its judgment, would be enforcing the specific conduct prohibited by the Act" the court will enforce the remainder of the contract with the invalid provisions severed. Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29, 34 (7th Cir. 1959).

The principles synthesized in Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 431 (1959), are entirely applicable here:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. . . . The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. . . . [T]he federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act. . . . If the defense of illegality is to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general. . . . Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it'. . . . Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operaton . . . is avoided by treating the defense as so confined." (358 U.S. 518-521, 79 S.Ct. 431).

Just as in *Kelly*, it would create "a very strange class of private attorneys general" here if Sealy were permitted to compel plaintiffs to enter into the proposed new and more onerous contracts because the territorial sales restrictions in the present contracts have been declared unlawful. Any such result would permit Sealy to impose additional financial and other burdens on the California manufacturers simply because Sealy lost the *Sealy* antitrust case.

It is settled that severance of invalid provisions from contracts is the result called for by federal antitrust principles unless the enforcement sought by plaintiffs "would be enforcing the specific conduct prohibited by the Act." Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29, 34 (7th Cir. 1959). No one is seeking enforcement of conduct prohibited by the antitrust laws in the case at bar.

In conclusion it is to be remembered that this is not a case:

(1) where any by-law of Sealy, Inc. provided that anyone who took a Sealy license took so subject to the power of the board of directors of that company to change the contract by by-law,

(2) where a contract provided that the board of directors of Sealy, Inc. at its option could modify the contract at any time it wanted to do so,

(3) where the plaintiffs' California licensees are not paying their fair share of royalties to Sealy, Inc. (As the record demonstrates the California licensees pay on the basis of actual sales almost precisely the same percentage royalty as every other Sealy licensee.),

(4) where a court has said because the contract violates the antitrust laws, that the whole contract must fall, and finally and most importantly this is not a case where all that Sealy, Inc. has tried to do is to tender new contracts to the California licensees with the illegal provisions excised and with the remaining provisions approximately the same.

Summarizing, the record discloses that:

(1) the Sealy antitrust case Supplemental Final Judgment did not purport to render the California manufacturers' license contracts void unless they failed to consent to that judgment,

(2) the California manufacturers did consent to the judgment,

(3) the contracts of the California manufacturers contain a severability clause which plainly and unambiguously provides for severance of any unlawful portions of the contracts and survival of the remainder,

(4) the defendants produced no evidence indicating that the severability clause did not encompass the territorial sales restrictions held invalid in the *Sealy* antitrust case, and

(5) the record is barren of any justification for Sealy's unilateral attempt to disregard the plain language of the con-

tract, applicable contract law principles, and antitrust policy. Moreover, it appeared from the evidence that Sealy's motive for announcing that the contracts had become void was not to comply with the Supplemental Final Judgment. Instead, Sealy's purposes were to achieve Sealy's long-held goal of uniformity of contracts, to compel increased royalty payments from the California manufacturers, and to impose on them the other onerous conditions of the proposed new contracts.

Accordingly, it is hereby adjudged, ordered and decreed that the California manufacturers' contracts are severable and that the California manufacturers' contracts are not void but remain enforceable and in full force and effect with the exception of the severed territorial sales restrictions.

It is further ordered that Sealy is not entitled to terminate said contracts or to extract any condition more onerous on plaintiff-licensees as a prerequisite to continuing them as Sealy licensees.

A few words must be directed to Sealy's counterclaim, the gist of which is that Southern and Northern are not the California licensees. It is highly questionable what impact, if any, the Sealy counterclaim would have on the relief sought in the complaint. Northern, Southern and Ostrow are all parties to this case. A declaration of the severability of the sales restrictions is not dependent on the identity of the licensees.

A more than adequate answer to the licensee identity question of defendant lies in the "Plaintiffs' Post-Trial Answering Brief To Sealy's Counterclaim" which is hereby incorporated and made a part of the Court's findings of fact and conclusions of law.

Accordingly, the declaration of rights requested in the counterclaim is denied and the counterclaim is hereby dismissed.

OHIO-SEALY MATTRESS MANUFACTURING CO. et al.,
Plaintiffs,

v.

Louis C. DUNCAN et al., Defendants.

No. 79 C 2741.

United States District Court, N. D. Illinois, E. D.

Jan. 30, 1980.

## MEMORANDUM OPINION AND ORDER

ASPEN, District Judge.

This action represents yet another chapter in the seemingly endless antitrust litigation concerning Sealy, Inc. ("Sealy").[1] The principals herein are Sealy,[2] Ohio-Sealy Mattress Manufacturing Company ("Ohio"),[3] and Sealy Mattress Company of Oregon

[1] *See, e.g. United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967) ("Sealy"); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979), *on remand to the district court for consideration of equitable relief*, Civil Action No. 71 C 1243 (N.D.Ill.) ("Ohio-Sealy"); *Ohio-Sealy v. Kaplan*, Civil Action No. 76 C 810 (N.D.Ill.).

[2] The defendant Sealy is a Delaware corporation with its principal place of business in Chicago, Illinois. It is the owner of certain trademarks under which Sealy bedding is sold, and licenses the use of those trademarks by various companies. The licensees of Sealy—twelve in number—own more than 90 percent of the Sealy shares. As a licensor, Sealy provides national advertising for Sealy products as well as other services functions, such as product specifications, quality control, research and development, and marketing plans. In return, Sealy receives royalties from the licensees based on the licensees' total sales. In addition, Sealy itself in recent years has become involved in the sale and manufacture of Sealy bedding through a number of wholly-owned subsidiaries.

[3] Ohio-Sealy, the plaintiff herein, is an Ohio corporation with its principal place of business in Ohio. Ohio is one of the largest Sealy licensees,

*(Footnote continued on next page.)*

("Portland").[4] Ohio filed this action against Sealy in July, 1979, alleging that Sealy, its directors, and licensees were engaged in a continuing conspiracy to effect a horizontal territorial allocation of the market for Sealy products. The complaint further alleges a breach of the fiduciary duty by the named directors of Sealy.

On November 19, 1979, Ohio sought leave to file a Supplemental Complaint consisting of two additional counts against Sealy arising from its decision to purchase Portland.[5] In August, 1979, Ohio entered into a stock purchase agreement with Portland. Pursuant to the agreement, the stockholders of Portland agreed to sell to Ohio all their shares for $7,250,000 and 112,500 shares of Ohio common stock. Sealy also agreed to indemnify each Portland stockholder up to the aggregate sum of $6,250,000 against any adverse judgment entered against them in the Sealy litigation.

In accordance with the Sealy License Agreement, Portland and Ohio notified Sealy of the intended acquisition. Sealy's board of directors met in September, 1979, to consider whether Sealy should exercise its right of first refusal. In early October, Sealy authorized the purchase of 112,500 shares of Ohio common stock in order to enable Sealy to match Ohio's offer if it so chose. By November 13, 1979, Sealy had succeeded in purchasing 112,500 shares of Ohio common stock on the open market. On that same

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*(Footnote continued from previous page.)*
as it has five wholly-owned subsidiaries and primary responsibility for the territories composed of six states, the Commonwealth of Puerto Rico, and the American Virgin Islands. Ohio is also one of the best Sealy subsidiaries, in that it produces a consistently high-quality product, markets it effectively, and turns a better profit on its operations than either the defendant or the other licensees.

[4]Portland, also a licensee of Sealy, is an Oregon corporation with its principal place of business in Portland, Oregon. Its primary sales area consists of Alaska, Idaho, Oregon, and Washington.

[5]By a separate order, the Court has granted Ohio's motion for leave to file a Supplemental Complaint.

day, the board of directors met and voted to purchase Portland by exercising the right of first refusal. Portland was notified of this action the following day, and chose to go forth with the sale to Sealy rather than exercise its right to withdraw the offer to sell. The closing date for the purchase was scheduled for January 3, 1980.

In its supplemental complaint of November 19, Ohio alleges that Sealy's exercise of the right of first refusal with respect to Portland failed to comply with the contractual requirements for an exercise of that right, constituted tortious interference with Ohio's contractual relationship with Portland, and violated federal antitrust law.[6] At the same time, Ohio filed a motion for a preliminary injunction, seeking to prevent Sealy from closing its purchase of Portland. On December 6, the Court assigned this, as well as an earlier related case involving Sealy,[7] to a magistrate for supervision of all pretrial matters, and for the submission of proposed findings of fact and conclusions of law with respect to the motion for a preliminary injunction. 28 U.S.C. § 636(b)(1)(A), (B).

The magistrate held an evidentiary hearing on the motion for preliminary injunctive relief for six trial days, from December 13-21, 1979.[8] During this period, Portland moved to intervene in the motion, alleging that its stockholders would be irreparably harmed if the sale were not permitted to close on January 3, 1980. Leave to intervene was granted, and Portland thereafter filed a

[6]Jurisdiction of the antitrust claims is conferred upon this Court by Section 4 of the Sherman Act, 15 U.S.C. § 4, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Jurisdiction of the state law claims is premised on the diversity statute, 28 U.S.C. § 1332.

[7]*Ohio-Sealy v. Kaplan*, Civil Action No. 76 C 810 (N.D.Ill.).

[8]During these proceedings, Ohio called five witnesses to testify and introduced into evidence 73 exhibits. Sealy offered testimony of six witnesses and placed 10 exhibits into evidence.

document objecting to the attempt to enjoin the sale.[9] At the close of the evidentiary hearing, Ohio and Sealy stipulated to an extension of the closing date until January 31, 1980, an extension which is provided for in the purchase agreement.[10]

On January 16, 1980, the magistrate issued his proposed findings of fact and conclusions of law. He concluded that there was a likelihood that Ohio would prevail on the merits of its antitrust claims, but not on its contract and tort theories. The magistrate also determined, however, that Ohio would suffer no irreparable harm if Sealy were allowed to close the sale and Ohio later prevailed on the merits. As to the balance of hardships, he found that the harm that would flow to Ohio from failing to enjoin the purchase was no greater than was the harm that would accrue to Sealy if an injunction were issued.[11] Finally, the magistrate concluded that issuance of an injunction would not be contrary to the public interest.

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[9]Leave was granted upon the oral motion of counsel who represented Portland. The document filed, however, was by a different attorney on behalf of the stockholders of Portland. Counsel then reappeared on behalf of Portland, the corporate entity, and requested to withdraw Portland's intervention. The magistrate declined to dismiss the corporate entity pending clear identification of all the Portland stockholders, so as to insure that all parties necessary to effect any possible relief were present. The Court agrees with the magistrate's action. Since no further identification of the Portland stockholders has been offered, both Portland and its stockholders remain as intervening parties on this motion for preliminary injunction.

[10]Portland objected to this extension by a motion filed December 28, 1979. Since this extension was made pursuant to a contractual provision in the purchase agreement, however, the Court finds no basis for Portland's objection.

[11]The magistrate did find, however, that an extended delay of the closing date for purchase—the unavoidable effect of the injunctive relief requested herein—would cause irreparable harm to Portland, "at least in the sense that Portland may have no legal recourse." Although the magistrate found that Portland could operate during a delay in the closing without a significant loss of business, he concluded that uncertainty as to Portland's ultimate purchaser would have a deleterious impact on the morale of Portland's employees and the company's operations.

On the basis of these conclusions, the magistrate recognized that injunctive relief normally would fail to issue, since there was no proof or irreparable harm to the moving party. He observed, however, that the legality of Sealy's various licensing provisions—including the right of first refusal—currently is being litigated before another judge in this district.[12] Since the magistrate believed that the outcome therein might be determinative as to whether Ohio or Sealy is entitled to purchase Portland, he recommended that both Ohio and Sealy be enjoined from purchasing Portland pending the ruling in Sealy. Yet, due to the harm that might result to Portland from prolonged uncertainty as to the identity of the ultimate purchaser, the magistrate recommended that if a ruling on the equitable issues in *Ohio-Sealy* is not issued by April 30, 1980, then Sealy should be permitted to close its purchase with Portland at that time. Alternatively, the magistrate recommended that Sealy be permitted to close its purchase with Portland as scheduled on January 31, 1980, but that the closing should be subject to a "hold-separate" order which provides for the remedy of divestiture if Ohio prevails on the merits.

Pursuant to 28 U.S.C. § 636(b)(1), the parties were given ten days to file written comments on and objections to the magistrate's recommended findings and conclusions. All parties have done so.[13] Upon consideration of the evidence presented before the

[12]After the jury verdict in *Ohio-Sealy*, the trial judge found that Ohio was entitled to no equitable relief whatsoever. The Seventh Circuit reversed this ruling, and remanded the case to the district court for reconsideration of the appropriate equitable relief. *Ohio-Sealy v. Sealy*, Civil Case No. 71 C 1243 (N.D.Ill.), *on remand from* 585 F.2d 821 (7th Cir. 1978).

[13]In addition to the parties that appeared before the magistrate, the Court granted leave to the Sealy Mattress Company of Michigan ("Michigan") to file an amicus brief. Michigan, a Sealy licensee, is a party defendant in *Ohio-Sealy v. Kaplan*, Civil Action No. 76 C 810 (N.D.Ill.). In that action, Michigan also has filed a cross-claim against Sealy, alleging that Sealy's exercise of the right of first refusal against Michigan in April, 1978, violated the antitrust laws.

magistrate, his findings and recommendations, and the objections posed by the parties, the Court finds that Ohio is not entitled to an injunction prohibiting Sealy from closing its purchase of Portland. Rather, the Court adopts the magistrate's alternative recommendation, that the sale of Portland to Sealy be permitted to go forth on January 31, 1980, subject to a hold-separate order.

I. *The Standards For Preliminary Injunctive Relief*

A preliminary injunction is a vehicle by which the conduct of a party may be prohibited prior to any conclusive determination on the merits that the conduct in question is in fact illegal or inappropriate. For this reason, the case law has recognized that a preliminary injunction is an extraordinary remedy "not to be indulged in except in a case clearly warranting it." *Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc.*, 545 F.2d 1096, 1097 (7th Cir. 1976). It is within the discretion of the Court to grant a motion for preliminary injunctive relief when the moving party satisfies its burden of persuasion as to each of the following prerequisites: (1) an inadequate remedy at law and irreparable harm in the absence of an injunction; (2) the threat of harm to the movant outweighs the harm that would result to the opposing party if an injunction issues; (3) at least a reasonable likelihood that the moving party will prevail on the merits; and (4) the public interest will not be disserved by the granting of injunctive relief. *Fox Valley*, 545 F.2d at 1097; *see also Citizens Energy Coalition of Indiana v. Sendak*, 594 F.2d 1158, 1162-1163 (7th Cir. 1979); *Local Division 519, Amalgamated Transit Union, AFL–CIO v. LaCross Municipal Transit Authority*, 585 F.2d 1340, 1351 (7th Cir. 1978).

A. Irreparable Harm and Inadequacy of Legal Remedies

It is beyond dispute that "[t]he basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 952, 39 L.Ed.2d 166 (1974); *Beacon Theatres v. Westover*, 359 U.S. 500, 506–507, 79 S.Ct. 948, 954–955, 3 L.Ed.2d

988 (1959); *Fox Valley*, 545 F.2d at 1098. At the outset, however, Ohio argues that this high standard need not be met in a case where the party seeking the injunction establishes a clear probability of success on the merits; that in such cases, it is sufficient to show merely a "possibility" of irreparable injury. Although there are some cases which suggest this less stringent standard of irreparable harm,[14] this has never been the rule in the Seventh Circuit.[15] It must be remembered that the conduct enjoined by a preliminary injunction is presumptively legal.[16] Indeed, this is why the preliminary injunction is considered an extraordinary remedy. Yet, adoption of plaintiff's "possibility" standard for determining irreparable harm would dilute seriously the extraordinary nature of injunctive relief by making it more readily available.[17] Moreover, it would do so without advancing the underlying purposes of preliminary injunctions. A movant needs the protection of a preliminary injunction only when threatened with injury that could not be remedied even if in the future he prevailed on the merits. If a movant cannot persuade the court that there is more than a mere "possibility" of such harm, then he

[14] *See e. g. John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 27 (2d Cir. 1978); *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973). Recent decisions in the Second Circuit, however, suggest that closer adherence to the irreparable injury standard is now required. *See Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Company*, 604 F.2d 755, 758 (2d Cir. 1979); *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

[15] Indeed, the Seventh Circuit rule is just the opposite. Where there is a strong showing of irreparable harm, the movant may be held to a lesser standard of proving likelihood of success on the merits. *Fox Valley*, 545 F.2d at 1098; *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 293 (7th Cir. 1974).

[16] The only exception to this general rule is when the Court, invoking the authority granted by Fed.R.Civ.P. 65(a)(2), orders that the trial on the merits of the action be advanced and consolidated with the hearing on the motion for preliminary injunctive relief. Rule 65(a)(2) was not utilized in this proceeding.

[17] As Voltaire observed in *Candide*, anything is "possible."

should not be entitled to the benefits of preliminary injunctive relief.

Ohio argues that it will suffer irreparable harm in three ways if an injunction does not issue. First, it argues that if it prevails at trial, it will be unable to prove fully the amount of profits it lost as a result of the unlawful acquisition of Portland. Not only will it be impossible to determine the extent to which Ohio could have increased the sales within Portland's area of primary responsibility (APR),[11] but it also will be impossible to calculate the profit that Ohio would have made from sales outside the Portland APR.

It is true that difficulty in ascertaining the correct amount of damages is relevant in determining the existence of irreparable harm. And there have been instances in which the inability to calculate future losses has resulted in a finding of irreparable harm. *See Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969); *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F.Supp. 1248, 1256 (S.D.N.Y.1974). However, it also is recognized that there is broad latitude in establishing damages in private antitrust actions. *Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Company*, 604 F.2d 755, 763 (2d Cir. 1979); *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976). While the amount of damages may not be calculated solely on the basis of mere speculation or guesswork, neither is it required that the damages be based on mathematical certainties. Rather, the finder of fact "may make a just and reasonable estimate of the damage based on the relevant data presented at trial and render its decision ac-

[11]An APR is a specific geographic area which the licensing agreement assigns to each Sealy licensee. Within this area, the designated licensee maintains responsibility for satisfactory sales performance. Licensees also are permitted to make sales outside of their APR's, but such sales have been conditioned upon certain payments which will be discussed more fully *infra*.

cordingly." *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 991 (7th Cir. 1976).

The Court believes that such an estimate is possible in this case. Indeed, it is more than a little disingenuous for Ohio to suggest otherwise. In *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed. 486 (1979), Ohio in fact devised a method for calculating its lost profits resulting from increased sales it would have earned had Sealy not purchased an intended acquiree by invoking its right of first refusal. This method involved application of a representative Ohio plant profit margin to the sales actually made by Sealy after acquisition. The fact that the Seventh Circuit allowed this calculation to stand reflects its view that the method provided a sufficiently precise measure of damages. *Ohio-Sealy*, 585 F.2d at 833 n. 18. In addition, it must be observed that Ohio owns five subsidiaries in various regions of the country. Thus, there is a wealth of comparative data from which Ohio—and a fact finder—can draw inferences as to the amount of damages suffered by Ohio's inability to purchase Portland as planned.[19] Establishment of damages by this method might well be inexact in a mathematical sense. But so long as it is a "just and reasonable estimate," Ohio cannot claim that the harm from this imprecision is irreparable.

Moreover, even if the Court were to conclude that the damages were irreparable due to the inability to calculate accurately the lost profits, it would be inappropriate to issue an injunction on this basis. It is clear that injunctive relief should not be granted if it would be unavailing in preventing the irreparable harm of which the movant complains. *Mullis v. Arco Petroleum Corporation*, 502 F.2d 290, 293 (7th Cir. 1974). In this case, Ohio alleges that

[19] In none of the cases cited by Ohio, in which the damages were found to be incalculable, did there exist such comparative data from which inferential estimates of damages could be made.

it will be deprived of adequate compensation for the profits it would have made had it been able to purchase Portland as planned. Thus, the harm stems from Ohio's inability to obtain Portland *now*, not from Sealy's imminent purchase of Portland. An order enjoining Sealy from closing on its purchase of Portland in no way would forestall this harm.

Ohio appears to recognize this, as it now asks the Court not only to enjoin Sealy's scheduled purchase of Portland, but to declare that Ohio should be permitted to purchase Portland on January 31, 1980. This, of course, the Court cannot do. Although a great deal of evidence was adduced before the magistrate, this action still is in a very preliminary posture. Should the case go to trial, the parties no doubt will introduce a great deal more evidence, particularly on the antitrust claims. Only then will it be appropriate for the Court to determine conclusively who shall have the right to purchase Portland. Until that time, the right of first refusal is a legal right conferred upon Sealy by the licensing agreements. The most that Ohio could hope to accomplish at this stage of the proceedings is to enjoin the exercise of that right; it certainly is not entitled to have that right eliminated *in toto*.

Ohio also claims that irreparable harm would occur if the Court permits Sealy—a fierce antagonist of Ohio—to purchase Portland. Ohio's theory is that Sealy, through its operation of Portland, will develop "good will" in the sense of close relationships with Portland customers. Thus, Ohio contends that if it later does obtain Portland, Sealy will be able to exploit this good will to Ohio's detriment. Somewhat inconsistently, Ohio also argues that if Sealy knows its purchase of Portland will be divested if Ohio prevails on the merits, Sealy might allow Portland to deteriorate as a business.

Neither of these theories support a conclusion of irreparable harm. This case is distinguishable from the line of decisions in

which loss of good will was found to be irreparable harm. In *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814 (2d Cir. 1979), for example, the court affirmed the issuance of a preliminary injunction preventing the defendant corporation from purchasing a 29 percent interest in the plaintiff corporation. In finding the existence of irreparable harm, the court emphasized the ill-effects that could arise from this sizable interest being held by a *direct competitor* of Schaefer:

> Schmidt would have access to the confidential trade information of one of its leading competitors, including its marketing, pricing, advertising, and new product plans, and could possibly steer Schaefer in a direction that would favor Schmidt's interests at the expense of Schaefer.
>
> * * *
>
> In addition there would be the risk of decreased organizational morale among Schaefer executives, unsure whether the fruits of their efforts would be siphoned to Schmidt, and among Schaefer's sales personnel and wholesalers, who might forsake it for other brands rather than face the prospect that a Schmidt takeover would result in their being supplanted by its wholesalers.

597 F.2d at 818.

In this and other "good will" cases, the factual pattern usually has been one in which the movant for injunctive relief is an intended acquiree of a direct competitor. As is evident from *Schaefer*, the prospect of a competitor controlling, or even influencing, the acquiree's business affairs is a troubling one. Such a situation well might jeopardize the future of the acquiree. The instant case, however, does not involve a purchase of a direct competitor; rather, it poses the question of which of two potential competitors—Ohio and Sealy—should have the right to purchase a third company—Portland. To the extent that Ohio suggests that Sealy will allow Portland to deteriorate, this harm is far too speculative a foundation upon which to base a finding of irrepara-

ble harm. *Jack Kahn Music*, 604 F.2d at 761. Moreover, even if Sealy were inclined to allow Portland to deteriorate—and there is no evidence that it would—Ohio's continued viability as a business would not be threatened. Thus, the reasoning of *Schaefer* is inapplicable to this situation. To the extent that Ohio argues that it will be harmed by Sealy's exploitation of the good will it develops while owning Portland, there again is the problem of the speculative nature of the alleged harm. There is no evidence in the record to suggest that Sealy intends to use any good will developed to impede Ohio's operations should Ohio prevail on the merits and obtain Portland.

In addition, *Schaefer* observed that the extreme remedy of a preliminary injunction might not be necessary in a case where there were available other means of avoiding the anticipated harm. 597 F.2d at 818; *see Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978). In this case, the concerns expressed by Ohio may be addressed by a hold-separate order which insulates Sealy from control of Portland's day-to-day operations. This further minimizes the likelihood that Sealy will intentionally allow Portland to deteriorate, or that Sealy will be able to develop close working relationships with Portland's customers during the pendency of this litigation. Thus, if Ohio does gain possession of Portland, it will receive what it bargained for in the first instance: the good will and relationships developed by Portland through the years. Injunctive relief is neither necessary nor appropriate to obtain this end.

Finally, Ohio argues that if Sealy is permitted to close its purchase of Portland, the unavailability of the remedy of divestiture in private antitrust litigation might prevent Ohio from ever gaining possession of Portland even if Ohio prevails on the merits. The case law is split on whether private parties may obtain divestiture in antitrust litigation. *Compare Bosse v. Crowell Collier and MacMillan*, 565 F.2d 602 (9th Cir. 1977) (divestiture unavail-

able) *with NBO Industries Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), *rev'd on other grounds sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F.Supp. 404 (S.D.N.Y.1978) (divestiture available). The Seventh Circuit has not foreclosed the availability of divestiture in private antitrust litigation.[20]

Whatever the legal availability of divestiture to separate a fully consummated purchase, the Court believes that it possesses the authority to allow the prospective purchase of Portland upon the condition that Sealy divest itself of the purchase if it loses on the merits.[21] Indeed, by issuing a hold-separate order, the Court facilitates the future possibility of resale of Portland to Ohio by preventing the separate corporate identities of Portland and Sealy from merging into one. If Ohio should prevail on the merits, the Court could consider the question of whether resale to Ohio is needed in order to make Ohio whole without being concerned that divestiture would place an onerous burden on Sealy. Therefore, Ohio cannot claim irreparable harm on the basis of the unavailability of divestiture. A hold-separate order which preserves Ohio's right to obtain Portland if (1) it prevails on the merits and

[20] *Ohio-Sealy*, 585 F.2d at 845 n. 34. Moreover, the Court in passing notes that Ohio's concern about the availability of undoing the purchase of Portland assumes that liability will be found only on the antitrust claims. Although the Court at this time expresses no view on the merits of Ohio's common law claims, *see* note 26, *infra*, the Court does observe that if Ohio should prevail on these theories, the Court's broad equitable powers could be used to fashion a remedy which includes the relief that Ohio seeks.

[21] This is not a situation in which the Court is viewing a completed transaction retrospectively and considering the appropriate after-the-fact remedial measures. Rather, this case presents a prospective sale, thus permitting the Court far greater latitude in ensuring that the sale does not preclude the availability of certain remedies to Ohio. Accordingly, the Court considers the debate concerning the availability of divestiture in private antitrust litigation to be inapplicable to the facts herein.

(2) the Court finds no legal impediment to an order compelling resale of Portland to Ohio, is sufficient to protect Ohio's interests.[22]

As is clear from the foregoing, Ohio has failed to carry its burden of proving that it will suffer irreparable harm if the Court fails to enjoin Sealy's scheduled purchase of Portland.[23] Normally, the Court might forego further inquiry into the other prerequisites for injunctive relief. *Fox Valley*, 545 F.2d at 1098; *Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture*, 469 F.2d 1387, 1388 (3d Cir. 1972). The Court, however, finds it appropriate in this case to examine the other factors relevant to the issue of injunctive relief. While the equities of this case do not warrant injunctive relief, they do justify the intermediate step of a hold-separate order. This order will impose substantial conditions upon Sealy's purchase of Portland. Sealy apparently has no objection to the entry of such an order, and the order provides for the signed agreement of the parties. However, the Court deems it important to note that such an order could issue—even without Sealy's acquiescence—on the basis of the plaintiff's likelihood of success on the merits of this litigation and the yet-prospective nature of the Portland pur-

[22]Ohio, on the other hand, argues that if an injunction is denied, the hold-separate order should provide unconditionally for divestiture of the Portland purchase and resale to Ohio should Ohio prevail on the merits. At this stage of the proceedings, however, it cannot be said with certainty that if Ohio's case is meritorious it will be entitled to purchase Portland. For now, it is sufficient that the possibility of such a purchase is preserved by the hold-separate order.

[23]Nor can the harm to Portland provide a basis for finding irreparable harm in this case. The Court agrees with the magistrate's finding that Portland will be harmed in some measure by uncertainty as to its ultimate owner. This harm, however, cannot be prevented by the granting of a preliminary injunction. All that such an injunction would accomplish is the delay of the closing date. Portland still would not have the certainty it needs. That can only be provided by a conclusive determination as to which party, Ohio or Sealy, is entitled to own Portland. Unfortunate though it may be for Portland, this determination can only be made after a full determination of the merits.

chase.[24] Thus, the Court now turns to the remaining elements of the *Fox Valley* test for preliminary injunctive relief.

B. Balance of Hardships

Inasmuch as the Court found that Ohio will suffer no irreparable harm as a result of the purchase conditioned upon a hold-separate order, it cannot be said that more harm will accrue to Ohio from the denial of injunctive relief than would come to Sealy if an injunction were granted. Ohio, however, argues that there are several other indicia of hardship which tip the balance in favor of granting injunctive relief.

Ohio cites the magistrate's finding that Portland may suffer irreparable harm from the uncertainty as to who will be its ultimate purchaser. An injunction merely preventing Sealy from purchasing Portland on January 31, however, would not resolve Portland's dilemma. The only thing that can provide Portland with the certainty it seeks is an ultimate determination as to who is entitled to purchase Portland: Ohio or Sealy. As indicated above, this issue simply cannot be resolved at this stage of the proceedings. Ohio also suggests that Portland's alleged preference for Ohio as its purchaser should figure in the Court's analysis. Portland's preference as to its ultimate purchaser, however, is irrelevant to whether Sealy has the legal right to acquire Portland. Consequently, it is equally irrelevant to whether Ohio can enjoin preliminarily Sealy's purchase of Portland.

Finally, Ohio suggests that a preliminary injunction would be in the best interests of Sealy. Ohio reasons that since Sealy will be required to borrow heavily in order to purchase Portland, it will be injured seriously if it loses on the merits and is forced to divest its purchase. This sudden solicitousness for the well-being of Sealy is quite surprising in light of the heretofore acrimonious

[24]Indeed, were a hold-separate order providing for possible resale to Ohio not a realistic option in this case, the Court would have to reevaluate its conclusion that Ohio would not suffer irreparable harm if the sale is not enjoined.

relationship between the parties. Nonetheless, it is misplaced. The Court is confident that Sealy is able to form judgments as to its own best interest without the assistance of Ohio. Moreover, if Ohio should prevail in its attempt to wrest ownership of Portland from Sealy, it will be able to do so only upon payment of a "fair price" to Sealy. *Ohio-Sealy*, 585 F.2d 845 n.34.[25] Thus, the Court finds that the balance of the hardships does not point in the direction of granting preliminary injunctive relief.

C. Likelihood of Success on the Merits

To satisfy this prong of the test for granting preliminary injunctive relief, the movant must at the very least demonstrate that his claims are "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Mullis v. Arco Petroleum Corporation*, 502 F.2d 290, 293 (7th Cir. 1974); *see also Jack Kahn Music*, 604 F.2d at 763; *Fox Valley*, 545 F.2d at 1098; *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205–1207 (2d Cir. 1970). In *Local Division* 519, 585 F.2d at 1351, the Seventh Circuit found that a trial court's conclusion that the moving party had a "good chance" to succeed on the merits was sufficient to meet this test.

Ohio has proven to this Court's satisfaction that it has more than a "good chance" to prevail on its claim under Section 1 of the Sherman Act.[26] The essence of any Section 1 violation is a

[25]Such a price would take for its baseline the purchase price paid by Sealy at the January 31, 1980, closing of its acquisition of Portland. At the conclusion of the litigation, the resale price of Portland to Ohio would be adjusted to take into account inflation as well as interest Sealy could have earned on the money paid for Portland—since a decision for Ohio surely would entitle it to profits made by Portland while under Sealy ownership—during the pendency of the litigation. Should the parties be unable to agree on this adjusted resale price, the Court would resolve the disagreement.

[26]The magistrate found that Ohio also would prevail on its Section 7 claim, but was unlikely to do so on its state law claims. This Court's conclusion that Ohio is likely to prevail on its Section 1 claim makes it unnecessary to reach the other potential bases for liability.

contract, combination, or conspiracy to restrain trade. Ohio's theory under Section 1 is that Sealy's invocation of the right of first refusal was nothing more than an attempt to preserve the territorial market divisions of Sealy and its licensees by preventing Ohio from competing on the West Coast. Sealy, on the other hand, seeks to pose the issue solely as one involving whether Ohio has a "right" to extend its business operations to the West Coast. Whether or not Ohio possesses such a right is besides the point. The right which Ohio indisputably does possess is the right to conduct its business affairs free from attempts by Sealy to impose upon it restraints that are illegal under antitrust law. And the Court believes it reasonably likely that Ohio will prove on the merits that Sealy's exercise of its right of first refusal in this case constituted a Section 1 violation.

The history of Sealy and its encounters with the antitrust laws bears recounting in some detail. As originally structured, Sealy was jointly owned by a group of independent manufacturers to hold, develop, and license the Sealy trademark and promote the uniform nationwide marketing of the Sealy line of bedding products. Sealy neither manufactured nor marketed bedding itself. Under this scheme, the Supreme Court found that the arrangement of exclusive manufacturing and sales territories held by the licensees constituted horizontal territorial divisions,[27] a *per se violation of Section 1. United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967).

[27]Horizontal territorial restraints arise out of decisions by competitors, or potential competitors, to restrict competition *inter sese* by dividing the geographic market into exclusive enclaves. Vertical territorial restraints, on the other hand, involve a decision by one competitor to impose territorial limitations on independent dealers as a condition of their right to sell that competitor's product. In *Sealy*, the Supreme Court found that Sealy's territorial allocations fell into the former category:

> The territorial arrangements must be regarded as the creature of horizontal action by the licensees. It would violate reality to treat them as equivalent to territorial limitations imposed by a manufacturer upon independent dealers as incident to the sale of a

*(Footnote continued on next page.)*

In the wake of that opinion, Sealy restructured its operations in several ways. First, it eliminated the exclusive licensee territories; in its place, Sealy introduced the concept of APRs, and made licensees responsible for meeting certain performance requirements in their territories. In addition, Sealy imposed two charges on any sales made by a licensee outside of its APR. First, Sealy required pass-over payments ranging from 2.2 percent to 11 percent of gross sales made out of the APR. These payments were made to Sealy, which in turn reimbursed the licensee in the "invaded" APR. Second, Sealy required a warranty repair payment of 1 percent of out-of-APR sales to cover the "invaded" licensee's purported expenses for product service repairs. The licensee agreements also assigned exclusive manufacturing territories, and forbade licensees to obtain an interest in any competing organization. Finally, Sealy instituted the right of first refusal clause.

Ohio, the plaintiff herein, filed suit in 1971 alleging that these changes in the licensing agreements were a transparent attempt by Sealy to continue the same market allocation policies that the Supreme Court had found illegal four years earlier. Ohio received a jury verdict in its favor, collecting $10,222,278.[28] On appeal, the Seventh Circuit affirmed.

At the outset, the court rejected the contention that Sealy's entrance into the manufacturing and sale of bedding rendered the

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*(Footnote continued from previous page.)*

trademarked product. Sealy, Inc., is an instrumentality of the licensees for purposes of the horizontal territorial allocation. It is not the principal.

388 U.S. at 354, 87 S.Ct. at 1851.

[28]The jury in *Ohio-Sealy* returned a verdict of $6,814,852 against Sealy. This amount was trebled pursuant to the antitrust laws, 15 U.S.C. § 15, to reach the total of $20,444,556 in damages. Ohio then accepted a remittitur of 50 percent of these treble damages, thereby making the final award of $10,222,278.

corporate structure vertical.[29] The Court observed that the licensees still owned 98 percent of Sealy's shares, and that representatives of the licensees occupied at least 11 of the 14 seats on the board of directors as well as all the positions on the board's executive committee. Thus, the Court concluded that

> [w]hatever may be said about the way Sealy conducts its business in those territories, it is indisputably clear that any restraints applied to the independent businesses which are licensees result directly from the concerted action of their horizontal potential competitors.

585 F.2d at 827.

As for the practices instituted by Sealy after the Supreme Court decision in 1967, the Seventh Circuit observed that none were illegal in and of themselves. However, the Court held that a jury could find that these practices violated Section 1 if they were designed to achieve a division of markets. 585 F.2d at 827. The Court found there was substantial evidence from which a jury could infer such a purpose. There was evidence that the system of passover payments and warranty charges far exceeded the amount necessary to prevent out-of-territory licensees from taking a "free ride" at the expense of a licensee selling within his APR. *Id.* at 828–829. With respect to the right of first refusal, the Court observed that Sealy had exercised that contractual right only five times—in each instance the would-be purchaser was Ohio, who was the most aggressive out-of-APR seller of all the Sealy licensees.[30] On all three occasions when Sealy actually

[29]At the time of the Supreme Court decision in 1967, Sealy itself neither manufactured nor sold bedding. Thereafter, Sealy began to enter this aspect of the business through the purchases of licensees. By the time of the Seventh Circuit opinion, Sealy's market share of bedding had reached a, proximately 27 percent of all Sealy products sold.

[30]The evidence presented before the magistrate showed that although Ohio accounts for less than 20 percent of all Sealy-label sales in the continental United States, it makes approximately 55 percent of all the out-of-APR sales in the Sealy organization. In 1978, 13.1 percent of its total sales were made out of its APRs, a significant increase from the 4.9 percent total registered in 1974.

purchased a licensee pursuant to this right of first refusal, the businesses have lost money since the acquisition. *Id.* at 830. On this basis, the court concluded that despite Sealy's "more legitimate explanation of its exercises of the right of first refusal,"[31] the jury could—and did—find that a least one of the purchases made under the right of first refusal violated Section 1. *Id.* at 844. The Seventh Circuit then remanded the case to the trial court to determine whether equitable relief was appropriate.

In the interim, Sealy has altered the composition of its board of directors. There now are only seven directors rather than fourteen: the president of Sealy and six outside directors who have no present or past interest in or affiliation with a licensee company. In addition, Sealy has proposed the elimination of the plant location clause, the passover payments, the warranty repair charge, and the prohibition against ownership of a competing mattress company. To date, Sealy has proposed no modification of the right of first refusal provision.[32]

Sealy objects to the magistrate's frequent reference to this history of conduct in reaching his conclusion that Ohio is likely to prevail on the merits of the Section 1 claim. It contends that the right of first refusal in this case, exercised by a "blue-ribbon" board of directors that is independent from the licensees, is clearly distinguishable from the prior exercises of that right as recounted in *Ohio-Sealy*. The Court agrees that Sealy should not be irrebuttably condemned in this case on account of its past

[31]At trial, Sealy had argued that its acquisition of licensees was spurred by the 1967 Supreme Court opinion, and represented an effort to reconstitute the Sealy manufacturing and sales function as a vertical structure.

[32]It should be emphasized that pending the ruling on the equitable issues in *Ohio-Sealy v. Sealy*, Civil Case No. 71 C 1243 (N.D.Ill.), these modifications, with the exception of the new board of directors, offered by Sealy are not binding. Thus, while they are relevant factors in determining the intent of Sealy vis-a-vis Ohio, they cannot yet be considered as permanent changes in Sealy's practices.

behavior. Yet, neither can Sealy expect this Court—or a jury—to view the instant case in a vacuum. This is neither necessary nor desirable.[33] There are a number of factual issues in this case concerning the intent of Sealy which cannot be fairly viewed without reference to the history of Sealy in general, and its relationship with Ohio in particular.

One such issue involves the independence of the directors. Although six of the seven directors have no past affiliation with Sealy, it is not clear that the licensees exercise no influence or control over the board. One of the board members is the president of Sealy; a relevant factor will be the degree of influence he holds over the outside directors. Moreover, it is the Sealy licensees, who own more than 90 percent of Sealy's shares, that elect the "independent" directors. It would not be unreasonable for a jury to find that Sealy's new board of directors is not as independent as Sealy suggests. This is particularly so in light of Sealy's past conduct. The Seventh Circuit opinion portrays an effort by Sealy to preserve the same territorial allocations found illegal by the Supreme Court eleven years earlier, albeit by more covert means. Although this alone does not conclusively establish that this effort continues to the present, it is a factor that cannot be ignored in assessing Sealy's present conduct.

As was the case in *Ohio-Sealy*, Sealy has offered a number of legitimate business reasons for its decision to exercise its right of first refusal and purchase Portland.[34] However, the Court believes

[33] *See* Fed.R.Ev. 404(b), which states that while evidence of past acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be used for other purposes, such as to prove intent. Although there is a fine line between the forbidden and the permissible use of prior acts evidence, the Court believes that a jury, properly instructed, can use such evidence properly.

[34] Sealy suggests that it decided to purchase Portland because at the price offered it represented a sound business investment. In addition, the decision allegedly was influenced by the fact that Sealy licenses are perpetual; thus, the only way to extinguish the license is for Sealy to acquire it.

that it is reasonably likely that a jury will find these explanations outweighed by the evidence which tends to show an illegal purpose lurking behind the exercise. There is, of course, the evidence that Ohio has been the primary target for Sealy's exercise of its right of first refusal.[35] There also was evidence adduced before the magistrate that Ohio pursues a policy of aggressively seeking sales outside its APR. In addition to its licensee, Portland, Sealy owns subsidiaries in the neighboring Northern California and Denver APRs. Over the past five years Ohio has sought a western location which would enable it to compete in these APRs.[36] The evidence before the magistrate tended to prove that Sealy consistently had acted in such a way as to prevent Ohio from gaining a foothold in the western territory.[37] Moreover, until Ohio had contracted to purchase Portland, Sealy had expressed no interest in obtaining that licensee. Finally, there is the fact that Sealy was forced to incur substantial indebtedness to purchase portland, and did so despite its projections that as a Sealy subsidiary Portland would not turn a profit for at least five years.

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[35]Until 1978, Sealy had exercised its right of first refusal exclusively against Ohio. Since that time, Sealy has exercised its right of first refusal to prevent a purchase by Michigan. With that sole exception, Sealy has invoked its right of first refusal against no prospective purchaser other than Ohio.

[36]As matters now stand, Ohio's closest plant to the West Coast is in Fort Worth, Texas, more than 1,000 miles away. Sealy, on the other hand, owns the five most westernly-located plants in the Sealy organization. Because of the bulk and weight of bedding products, the high cost of transportation, the reluctance of retailers to warehouse bedding products, and the need for customer sales calls, the bedding industry is highly localized. Rarely can a company serve areas more than 200-300 miles from its plant. As a result, Ohio is unable to make sales in the western APRs from any of its present locations.

[37]In August, 1976, Ohio sought approval to build a plant in Las Vegas, Nevada, or elsewhere in the western United States. This request was denied by the Sealy board of directors in March, 1977. Ohio renewed its request in April and May of 1977. In September, 1978, the board—which already had been restructured so as to be "independent" from the licensees—once again denied the request.

These facts bear strong similarity to those which the court in *Ohio-Sealy* found sufficient to sustain a Section 1 violation. Despite Sealy's protestations to the contrary, these facts could form the basis for a conclusion that the right of first refusal was exercised in order to maintain the horizontal market division among the licensees.[38] Thus, the Court finds it reasonably likely that Ohio will prevail on its Section 1 claim.

D. *The Public Interest*

The Court does not find that the public interest would be disserved in this case by the grant of injunctive relief, particularly since this action involves private parties. Indeed, to the extent the public interest is implicated in this action, it would be served by enjoining a purchase by Sealy which the Court believes is reasonably likely to be anticompetitive in purpose.

*Conclusion*

On the basis of the foregoing, the Court finds that Ohio is not entitled to enjoin preliminarily Sealy's scheduled purchase of Portland. Although Ohio has satisfied the Court that it is reasonably likely to prevail on the merits of its case, it has failed to show that it would suffer irreparable harm or that the balance of hard-

[38]Sealy also asserts that the restructuring of the board of directors has rendered the corporate entity vertical rather than horizontal. As observed by the Seventh Circuit in *Ohio-Sealy*, however, the key factor in determining whether to treat this as a horizontal or vertical market allocation case is whether the alleged allocation is the result of concerted action by licensees against a horizontal potential competitor. 585 F.2d at 827. Thus, it cannot be said as a matter of law that the reconstituted board of directors eliminates the horizontal nature of the alleged market allocation. Rather, the critical question will involve the actual degree of independence of the directors from the licensees. As indicated above, there is strong reason to question the independence of the directors. For this reason, the Court believes it reasonably likely that Ohio will be able to show that the alleged market allocation is horizontal in nature, notwithstanding the installation of the new directors.

ships would tip in its favor if an injunction did not issue.[39] The conclusion as to irreparable harm and the balance of the hardships, however, was based in part on the Court's view that the damages of which Ohio complained for the most part could be addressed by the less drastic remedy of a hold-separate order.

Accordingly, the Court's denial of preliminary injunctive relief does not mean that Sealy will be allowed to make its purchase of Portland completely unfettered. Rather, the Court will permit Sealy to close its purchase of Portland as scheduled on January 31, 1980, but subject to the provisions of the hold-separate order included in this opinion as Appendix A. Read together, the hold-separate order and the Court's opinion ensure that Ohio will not be harmed irreparably should Sealy's purchase of Portland be subsequently adjudged improper. The terms of the hold-separate order require that Sealy and Portland retain their separate identities throughout the course of this litigation.[40] This opinion directs that if at the conclusion of the litigation Ohio has prevailed on the merits, it shall be entitled to purchase Portland from Sealy so long as the Court finds no legal bar to such a sale.[41] Of course, should

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[39]The magistrate's recommendation that the purchase be enjoined stemmed from his view that it would be prudent to wait for a ruling on the equitable issues in the remand of *Ohio-Sealy v. Sealy, Inc.*; and if no decision was forthcoming by April 30, 1980, to deny preliminary relief to Ohio and allow Sealy to close the purchase. Given the finding that there is no irreparable harm that will result from the denial of injunctive relief, the Court believes it would be inappropriate to enjoin the purchase. Moreover, issuance of a hold-separate order will serve the function usually performed by injunctive relief. In this case, it will ensure that Ohio is not deprived the right to undo the transaction if it prevails on the merits and the Court finds no legal impediment to resale to Ohio. In this sense at least, the hold-separate order will preserve the status quo pending the outcome of this litigation.

[40]The Court will retain jurisdiction over Sealy's operation of Portland to ensure compliance with the provisions of the hold-separate order.

[41]It is clear from this opinion that the Court does not consider the possible unavailability of divestiture in private antitrust litigation to consti-

*(Footnote continued on next page.)*

Sealy prevail in this litigation, it then will be entitled to merge Portland into its corporate structure as a wholly-owned subsidiary. It is so ordered.

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*(Footnote continued from previous page.)*
tute a bar to resale of Portland to Ohio after trial. If Ohio prevails on the merits, the question will not be whether Sealy may be compelled to sell Portland, but rather, whether Ohio's purchase of Portland would be illegal itself. The record reflects no such illegality; nor does the Court at this time foresee any problems with a sale of Portland to Ohio. The Court, however, expresses no final conclusion as to this issue. The parties are not foreclosed from raising claims of illegality at a later time in these or other proceedings.

## APPENDIX A

## HOLD-SEPARATE ORDER

IT IS ORDERED that, subject to further order of this Court, Sealy after acquisition of Portland shall hold and maintain Portland as a separate and viable company and make or cause to be made no change in the ownership, business, operation, or condition thereof which might hinder later divestiture of the acquisition of resale of Portland to Ohio, pending the final decision herein. Without limiting the foregoing:

1. Sealy shall not sell, transfer, grant any option for the purchase or acquisition of, or otherwise dispose of the capital stock of Portland.

2. Sealy shall not mortgage, pledge or otherwise encumber or (other than as provided in paragraph 1 above) agree to any direct or indirect restriction on the transfer of the capital stock of Portland; provided, however, that Sealy may so mortgage, pledge or otherwise encumber or agree to any such restriction as security for (a) any borrowings incurred in connection with the purchase of such capital stock or with the purchase of capital stock of Ohio delivered as part of the consideration for such capital stock, or (b) any borrowings incurred to refund the borrowings referred to in clause (a), if the documents evidencing such security shall acknowledge the possibility of an order of divestiture or resale to Ohio in these proceedings and shall provide that (i) in the event of such divestiture or resale, the assets or stock so mortgaged, pledged or otherwise encumbered or restricted as to transfer shall be transferable free of such mortgage, pledge, encumbrance or restriction and, in such event, the sole security for such borrowings shall be a pledge of the proceeds of such resale; and (ii) in the event of default on such borrowings prior to such divestiture or resale, Ohio shall be given notice thereof and shall be given an opportunity to satisfy Sealy's obligations or cure such default and be subrogated to the second party's rights against Sealy.

3. Sealy shall not cause or permit Portland (i) to incur any secured indebtedness to Sealy or any entity or person

controlled by Sealy; (ii) to incur any unsecured indebtedness to Sealy or such entity or person unless such unsecured indebtedness is repayable at any time without premium and bears interest at or below the prime rate in effect from time to time; (iii) to incur any unsecured or secured indebtedness to any other person unless necessary to refund unsecured or secured indebtedness outstanding on the date of this order or permitted hereby; (iv) to purchase any debt or equity security of Sealy or make any loan to Sealy; or (v) to enter into any material contract out of the ordinary course of business without the prior approval of this Court. (For purposes hereof, "indebtedness" shall mean any obligation, including a guarantee, for the payment of money borrowed.)

4. Sealy shall not cause or permit Portland (i) to change its corporate name; (ii) to adopt or effect any plan of liquidation or dissolution; or (iii) to adopt or effect any plan of merger, reorganization or consolidation or for the sale of all or substantially all of the assets.

5. Sealy shall not cause or permit Portland (i) to sell, assign, sublicense, modify to its detriment, pledge, or otherwise dispose of or encumber the License Agreement or any of its rights thereunder; (ii) to sell, assign, sublease, modify to its detriment, pledge, or otherwise dispose of or encumber the [Portland or Seattle] leases or the leasehold interests created thereby; (iii) to sell, assign, mortgage, pledge, or otherwise encumber any tangible or intangible assets (now owned or hereafter acquired) or the products or proceeds thereof, other than in the ordinary course of business or in connection with the incurrence of secured indebtedness permitted by clause (iii) of paragraph 3 above; or (iv) to obligate itself to do any of the foregoing.

6. Sealy shall direct and cause Portland, and if necessary shall make loans to Portland under clause (ii) of paragraph 3 in amounts adequate (i) to maintain insurance for amounts and against risks as are appropriate to a company its size in its industry; (ii) to perform its obligations under the Portland and Seattle leases and the License Agreement; (iii) to repair or replace plant and equipment in the ordinary course of business; (iv) to pay all federal, state, and local taxes when and as

the same shall be due and payable, subject to Sealy's right to contest such taxes; (v) to comply with all laws and regulations the failure to comply with which would materially and adversely affect Portland; and (vi) to remain a corporation in good standing in the States of Oregon and Washington.

7. Sealy shall direct and cause Portland (i) to maintain, in accordance with sound accounting practice, separate, true and complete financial ledgers, books, and records; (ii) to prepare, in accordance with generally accepted accounting principles applied in a manner consistent with prior periods, financial statements which fairly present the financial position of Portland as at the end of, and the results of its operations and changes in its financial position for, each fiscal quarter; and (iii) to supply the Court with quarterly and annual financial statements within 30 days of the end of each fiscal quarter or within 90 days of the end of each fiscal year as the case may be, which annual financial statements shall be audited and covered by the report of a certified public accountant selected by agreement of the parties. If the parties are unable to reach agreement as to an accountant, the Court will designate a certified public accountant to perform the audits. Such audits will be conducted at the expense of Ohio.

8. Sealy shall pay to Portland on an annual basis an amount equal to the tax savings, if any, realized by Sealy as a result of the inclusion of Portland in its consolidated tax returns, state and federal.

9. Sealy shall not, and shall not cause or permit Portland to, take any action, direct or indirect, which would cause any changes or alterations to be made in Portland's business or operations including but not limited to changes in Portland's manufacturing, marketing and distribution organizations, or in Portland's banking relationships, except for any such changes or alterations as may be prudent in the ordinary course of business.

10. Sealy shall not, and shall not cause or permit Portland to, make any changes in the management of Portland except (i) to replace directors who die, resign, decline to stand for reelection, or when such replacement of a director at the

conclusion of his or her term would be in the best interest of Portland; and (ii) to replace managerial employees who voluntarily resign or who are discharged for cause, including but not limited to incompetence in the reasonable judgment of Sealy. The person who replaces any such director may be designated by Sealy but shall not be an associate of Sealy at the time of such replacement not during, or within five years after the expiration of, his term as a director and shall not have been an associate of Sealy at any time during the five-year period prior to such replacement. (For purposes herein, "associate" shall mean a stockholder, director, officer, or employee of Sealy or a controlling person, spouse, or other relative of any such person.) Sealy shall incur no obligation on behalf of Portland which would require that any employee or director be retained or compensated after any Court order compelling divestiture or resale of Portland to Ohio.

OHIO-SEALY MATTRESS MANUFACTURING COMPANY et al., Plaintiffs,

v.

Morris A. KAPLAN et al., Defendants.

No. 76 C 0810.

United States District Court,
N. D. Illinois, E. D.

Aug. 1, 1980.

## MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

This case comes before the Court for review of the Report and Recommendation issued by Magistrate Cooley on April 7, 1980, with respect to nine separate motions filed by the various parties.[1]

[1] Plaintiffs in this action, hereinafter referred to as "Ohio", are Ohio-Sealy Mattress Manufacturing Company and its wholly-owned subsidiaries: Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy Mattress Company of Fort Worth, Sealy of the Northeast, and Sealy Mattress Company of Georgia. There are two groups of defendants involved in these motions: Sealy, Inc. and its subsidiaries (Sealy Spring Corporation, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Arizona, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburg, Inc., and Sealy Mattress Company of Philadelphia, Inc.), hereinafter referred to as "Sealy"; and the former directors of Sealy and their respective licensees (Morris A. Kaplan, Sealy Mattress Company of Illinois, William H. Walzer, Sealy Connecticut, Inc., Sealy Greater New York, Inc., Waterbury Mattress Company, Morton H. Yulman, Sealy of Eastern New York, Inc., Sealy of Minnesota, Inc., Peter D. Brown, Sealy Mattress Company of Michigan, Inc., T. C. Englehardt, Jr., Fred G. Hodges, Bedding Company (a/k/a Sealy Mattress Company of Reading, Pa.), Sealy of Des Moines, Inc., Walter Hertz, Sealy Mattress Company of New Jersey, Inc., Joseph V. Moffit, Sealy of the Carolinas, Peerless Mattress Company, Lloyd B. Rosenfeld, Sealy Mattress Company of Oregon, Joseph R. Rudick, Maryland Bedding Company, James E. Thompson), hereinafter referred to as "director-defendants".

Pursuant to 28 U.S.C. § 636(b)(1), the parties have filed comments on and objections to certain of the magistrate's findings and conclusions. Upon examination of the magistrate's recommendation and independent consideration of the arguments posed by the parties, the Court adopts Magistrate Cooley's recommended denial of (1) Ohio's motion for summary judgment based on collateral estoppel; and (2) Sealy's motion to strike the Clayton Act allegation contained in Count VI of the Amended Complaint.[2] For the reasons stated herein, however, the Court must reject the magistrate's recommendation (1) that defendants' motion for summary judgment as to post-verdict damages stemming from pre-verdict acts be denied; (2) that Ohio's motion to sever Count VI of the complaint be granted; (3) that Michigan-Sealy's motion to file a cross-claim against Sealy be granted; and (4) that Ohio's motion to consolidate the 1976 and 1979 cases be granted.[3]

## I. *Ohio's Motion For Summary Judgment Based On Collateral Estoppel*

Although the Court is in agreement with the magistrate's recommendation that this motion be denied, the Court nonetheless deems it appropriate to clarify its view on this matter and to address certain precedent not discussed by the magistrate. Con-

[2] Defendants' motion to stay the proceedings in *Ohio-Sealy Mattress Manufacturing Co. v. Duncan*, 79 C 2741 (N.D.Ill.), pending the conclusion of this action and of proceedings in *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 71 C 1243 (N.D.Ill.), has been withdrawn, and thus need not be addressed further by this Court. And, since the parties have not objected to the Magistrate's recommendation that Ohio's motion to strike the defendants' summary judgment motion be denied, this Court will adopt that recommendation without comment. *See Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980).

[3] The magistrate also recommended that Ohio's motion to sever Count V of the complaint be granted. The Court, however, will defer consideration of that recommendation until the parties have responded fully to the Magistrate's Report and Recommendation of June 9, 1980, which contains a recommendation on defendants' motion for summary judgment as to Count V.

trary to the view expressed by the magistrate, the Court does not believe that *White v. Finkbeiner*, 570 F.2d 194, 201 (7th Cir. 1978), forecloses the possibility that an appellate court decision, by extrapolating from the trial court record, may provide the factual predicate necessary to accord a general jury verdict collateral estoppel effect. Rather, as the magistrate also concluded, the Court finds that the Seventh Circuit opinion in *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.* 585 F.3d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979) ("*Ohio-Sealy*"), simply did not provide such a predicate. With the exception of the findings that the jury "necessarily found that Sealy had allocated markets," *id.* at 827; and that "at least one of Sealy's first-refusal acquisitions . . . violated the antitrust laws," *id.* at 844, the court declined to hold that any particular practice attacked by Ohio was found by the jury to violate the antitrust laws. *Id.* at 844. Thus, beyond the holding that the jury found the existence of an illegal market allocation scheme, the Seventh Circuit opinion cannot collaterally estop defendants from litigating the legality of the practices attacked in this action.

Nor can the jury foreman's notes and affidavit be used to embellish the general jury verdict. The Court agrees that to allow such inquiry into the deliberative process would be contrary to the policy considerations underlying Fed.R.Evid. 606(b).[4] The deci-

[4]This is particularly so in light of Ohio's failure to seek one of the more specific types of verdicts permitted by Fed.R.Civ.P. 49. Although such verdict forms are available not by right of the parties but rather at the discretion of the trial judge, *Sadowski v. Bombardier Ltd.*, 539 F.2d 615, 622 (7th Cir. 1976), a number of courts have recognized the desirability of using special verdict forms in complex litigation. *See e.g. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979); *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922, 935-936 (5th Cir. 1976); *Envirex, Inc. v. Ecological Recovery Associates, Inc.*, 454 F.Supp. 1329, 1339-1340 (M.D.Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir. 1979). Indeed, as Judge Parsons himself has observed, his task in the equitable proceedings in the 1971 action would have been facilitated had there been explicit findings of fact made by the jury. *See* Transcript in Civil Action No. 71 C 1243 at 55 (November 5, 1979). In any event,

*(Footnote continued on next page.)*

sion in *Katz v. Eli Lilly & Co.*, 84 F.R.D. 378, 380-382 (E.D.N.Y. 1979), which permitted defendants to depose jury members for the purposes of determining the collateral estoppel effect to be accorded to a prior jury verdict, is factually distinguishable from this case in several important respects. First, the prior jury verdict in that case was rendered in New York state court, under whose law such examination of jurors apparently was permissible. 84 F.R.D. at 381 n.5. Second, the court found it appropriate to permit the defendants to inquire into the jury verdict in order to afford them an opportunity to meet the plaintiff's attempt to use the jury verdict in an offensive application of collateral estoppel. *Id.* at 382. Here, on the other hand, it is the parties seeking to inquire into the jury's deliberations who are attempting to apply the collateral estoppel doctrine. Thus, on the facts, the Court does not believe that *Katz* provides compelling authority for Ohio's position. Moreover, to the extent that *Katz* might be considered applicable to this situation, the Court declines to follow that precedent. Thus, Ohio's motion for summary judgment based on collateral estoppel is denied.[5]

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because Ohio failed to request such a verdict form, the Court cannot say whether Judge Parsons would have granted the request.
The Court emphasizes that the foregoing is not intended to suggest that Ohio is being "punished" for its failure to seek one of the alternative verdict forms permitted under Rule 49. Rather, the Court's discussion of Rule 49 only serves to underscore Ohio's failure to seek specific findings of fact by available means which do not conflict with the policies underlying Rule 606(b).

[5]Ohio has requested that this Court certify for immediate appeal under 28 U.S.C. § 1292(b) the question of whether a juror's notes may be used to determine the collateral estoppel effect to be accorded a general jury verdict. First, the Court does not believe that there is "substantial ground for difference of opinion" on this issue, since *Katz* is distinguishable on its facts. Moreover, given the Court's decision to grant defendants' motion for partial summary judgment, explained *infra*, it is unlikely that the factual matters Ohio seeks to estop relitigation of will have significant bearing in this case. Thus, it is unlikely that immediate appeal would "materially advance the ultimate termination of the litigation."

## II. *Defendants' Motion To Strike The Clayton Act Allegation of Count VI*

The court agrees with the magistrate's conclusion that the defendants have not shown they will be prejudiced unduly by permitting Ohio to pursue its Clayton Act claim. There is no question but that Ohio should have made this allegation part of the pleadings at an earlier date. However, defendants do not contend that they did not know of Ohio's intention to pursue this theory of liability in the instant action. *See Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380, 386 (2d Cir. 1968). Moreover, in light of the Court's ruling disposing of much of the amended complaint on the basis of res judicata and satisfaction of judgment, defendants' argument that the addition of the Clayton Act claim would further complicate an already unwieldy case carries little weight. Inasmuch as defendants have offered no other evidence of prejudice resulting from the addition of the Clayton Act claim, their motion to strike must be denied. *Seifert v. Solem*, 387 F.2d 925, 929 (7th Cir. 1967).

## III. *Defendants' Motion For Summary Judgment*

In this motion—the most significant of those addressed by the magistrate in his report and recommendation—the defendants seek to preclude Ohio from recovering post-verdict damages resulting from preverdict acts alleged in Counts I-IV and VI of the Amended Complaint.[6] Sealy argues that Ohio could have sought all past and future damages arising from defendants' pre-verdict conduct in the trial of the 1971 case. Thus Sealy contends that because there was a final judgment as to Ohio's damages from

[6]Ohio agrees that it is foreclosed by the judgment in the 1971 case from seeking any further per-verdict damages that might have stemmed from pre-verdict conduct. Defendants, for their part, do not dispute Ohio's right to seek post-verdict damages stemming from any acts committed subsequent to the verdict in the 1971 case. Thus, the Court's references to "future" or "post-verdict" damages will include only those post-verdict damages that allegedly are the result of pre-verdict acts.

those acts, Ohio is barred by res judicata from now recovering any damages it failed to seek in the 1971 action.[7] The director-defendants seek summary judgment on the same ground, conceding for the purposes of the summary judgement motion the existence of privity with Sealy.[8] In addition, the director-defendants contend that Ohio is barred by the doctrine of satisfaction of judgment from seeking recovery.

The magistrate recommended that the defendants' motion be denied. In reaching this conclusion, the magistrate determined that res judicata—as well as satisfaction of judgment—would not be applicable to post-verdict damages for the reason that such damages are equitable in nature, and that there has been no final judgment in the 1971 case on the equitable relief sought by Ohio. Neither Ohio nor the defendants, however, agree with this characterization of Ohio's request for post-verdict damages. Nor does this Court. It is clear that the future damages sought by Ohio in this action represent legal relief in the same sense as those damages which Ohio sought at the trial of the 1971 case. The

[7]The principles, as well as the underlying policies, of res judicata are well-established. In order to protect litigants from the time and expense of multiple lawsuits, to conserve judicial resources, and to minimize the possibility of inconsistent opinions, the courts have applied res judicata to bar further claims by parties or their privies based on a cause of action that has been terminated by a final judgment on the merits. *Montana v. United States*, 440 U.S. 147, 153-154, 99 S.Ct. 970, 973, 59 L.Ed.2d 210; *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed 195 (1877). Thus, the question presented by the res judicata motion—and indirectly by the satisfaction of judgment motion—is whether the future damages sought herein by Ohio are part of the same cause of action terminated by the final judgment in the 1971 case.

[8]The director-defendants, unlike Sealy, do not admit that Ohio did not seek future damages in the trial of the 1971 action. In light of the Court's disposition of their motion, however, it is unnecessary at this time to determine if in fact the jury award did include the future damages sought by Ohio in this action. *See Cromwell*, 4 Otto at 352, 94 U.S. at 352, 24 L.Ed. 195 (res judicata bars litigation of all claims that could have been raised, as well as those that were raised, in a prior proceeding on the same cause of action).

legal nature of the future damage relief is further highlighted by Ohio's request for treble damages, which is unavailable under the equitable provisions of 15 U.S.C. § 26. This legal relief is separate and distinct from any incidental damages that Ohio might seek in an equitable proceeding, as is evident from the fact that Ohio presently is seeking monetary relief as an incident of the equitable relief it hopes to receive in the proceeding under advisement before Judge Parsons. The Court, therefore, considers the post-verdict damages that Ohio is seeking herein to be legal relief for alleged harm from acts which were litigated and finally decided in the 1971 action.[9]

Viewed thusly, Ohio's claim for post-verdict damages against Sealy would appear to be foreclosed by res judicata, since the right to future relief generally merges with the past damage relief obtained in the judgment. Ohio, however, posits three arguments in an attempt to avoid this result. For the reasons that follow, this Court finds each equally unpersuasive.

Initially, Ohio asserts that because it had the "election" of pursuing future equitable relief or future legal relief in the 1971

[9]Even were this Court in agreement with the magistrate's characterization of future damages as equitable, it nonetheless would dismiss Ohio's claim for these damages as a result of the equitable proceeding pending before Judge Parsons. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976); *United Steelworkers v. Hamilton Steel Products, Inc.*, 404 F.2d 878, 879 (7th Cir. 1968), *cert. denied*, 394 U.S. 1000, 89 S.Ct. 1595, 22 L.Ed.2d 778 (1969); ("We think it was within the discretion of the district court to refuse to entertain the Union's Section 301 suit at this late date, for the issues can be properly disposed of in the interpleader and bankruptcy proceedings"); *United States v. American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 203–204 (3d Cir. 1967), *cert. denied*, 390 U.S. 922, 88 S.Ct. 857, 19 L.Ed.2d 983 (1968) ("[C]ertainly, if the ... relief sought in the sister court has been requested by the aggrieved parties ... the sister court should hold its hand."). *See also* 1B Moore's Federal Practice ¶ 0.410[2] at 1164–1165 ("[I]f separate suits are instituted and pending for various parts of a single cause of action, the pendency of the first may be pleaded in abatement of the others.").

action, it necessarily had the "election" to seek future equitable relief in that action and reserve the right to pursue future legal relief in a separate proceeding. Ohio's argument, however, fails to explain why its "election" should supersede the principles of res judicata that normally are applicable in situations such as this. Broadly speaking, a party always has the option—or election—of raising fewer than all the potential theories of relief that might be available. However, it is the rule that when a party can present all grounds in support of his cause of action, he must do so, if at all, in the proceeding on that cause of action. *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976). Once a final judgment is entered on that cause of action, res judicata prohibits relitigation of all issues raised therein as well as "all relevant issues which could have been but were not raised and litigated in the suit." *In re Interstate Stores, Inc.*, 558 F.2d 1046, 1047 (2d Cir. 1977); *see also Cromwell*, 94 U.S. at 352; *F. L. Mendez & Co. v. General Motors Corporation*, 161 F.2d 695, 699 (7th Cir. 1947). Thus, Ohio's talismanic invocation of the word "election" does not answer the question of whether its failure to seek future damages in the trial of the 1971 action precludes it from pursuing those damages in this action. Rather, the answer to that question turns upon whether the post-verdict damages Ohio now seeks were a part of the cause of action terminated by a final judgment in the 1971 action."

"Ohio's "election" theory is not salvaged by citation to *Roberts v. Sears, Roebuck and Company*, 617 F.2d 460 (7th Cir. 1980). In that case, plaintiff had filed suit seeking restitution or damages for defendant's fraudulent conduct in obtaining assignment of a valuable patent. Subsequent to a jury award of $1 million, the trial judge denied plaintiff the remedy of restitution on the ground that the jury verdict constituted an election of remedies. Plaintiff appealed this ruling, and defendant cross-appealed on the ground that it had been denied the opportunity to challenge the validity of the underlying patent. In *Roberts v. Sears, Roebuck & Co.*, 573 F.2d 976, 980-982 (7th Cir. 1978), *cert. denied*, 439 U.S. 860 (1978), the Seventh Circuit found that Sears was not entitled to raise patent defenses to plaintiff's fraud action. The court also found that while traditional election of remedies doctrine might preclude the desired equitable relief, it would not be a bar to return of the

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Ohio argues that since post-verdict damages were speculative at the time of trial in 1971 action, those damages constitute a separate cause of action under the reasoning in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338–339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971). In that case, which involved a question concerning the four-year statute of limitations applicable to antitrust actions, the Supreme Court observed that a cause of action accrues "when a defendant commits an act that injures a plaintiff's business," and that each cause of action that accrues entitles a plaintiff to recover past as well as future damages he predictably will suffer. In order to recover such damages, however, the Supreme Court held that suit must be filed within four years of the complained of acts unless "the fact of their accrual is speculative or their amount and nature unprovable," for the reason that the speculative nature of the damages makes it impossible to say that a cause of action has accrued.

Ohio seeks to apply this reasoning to the instant case. Ohio alleges that it could not have known that it would suffer post-verdict

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patent based on rescission. On remand, however, the trial judge not only granted return of the patent, but also ordered an accounting of defendant's profits reaching back to the date of assignment. In the second appeal, the Seventh Circuit found that the only further remedy plaintiff could receive in the fraud action was restoration of the patent as of January 20, 1977, the date of final judgment on the jury verdict. The court emphasized, however, that plaintiff could sue for any alleged patent infringement occurring after that date, and that defendant could defend in such an action on the basis of patent invalidity. 617 F.2d at 465.

Ohio suggests that *Roberts* sanctions the procedure it has adopted, whereby it sought past damages up to the point of trial in the 1971 action and now seeks post-verdict damages in a separate proceeding. As is evident from the foregoing, however, any future damages the plaintiff in *Roberts* might seek stem not from the fraud cause of action that terminated in the final judgment of January 20, 1977, but rather from a distinct cause of action arising from patent infringement subsequent to that date. Thus, since Ohio has not persuaded the Court that the future damages sought herein constitute a separate cause of action from the 1971 case, *Roberts* provides no authority for its position.

damages from the acquisitions, since it had no way of knowing whether the defendants would retain possession of the acquired corporations after the jury verdict. In addition, Ohio argues that the amount of future damages it would suffer in the event of defendants' continued retention of the acquired corporations was unprovable.

Assuming the applicability of the *Zenith* doctrine to issues of res judicata,[11] the Court is unpersuaded that Ohio's damages were speculative in either of the senses contemplated by *Zenith*. Ohio's position as to the fact of post-verdict damage is simply specious. Distilled to its essence, Ohio's position is that because there has been a delay in the equitable relief sought—which relief conceivably might include divestiture of the disputed acquisitions and their resale to Ohio—and because the defendants voluntarily could have given or sold the acquisitions to Ohio, the possibility of future damages was so speculative as to preclude presentation to the jury. The latter argument flies in the face of reason, as it assumes that a party which has litigated to keep certain acquisitions suddenly would do an about-face and "give up" those same acquisitions. Moreover, to the extent that the prospect of the equitable hearing created some uncertainty as to the existence of future damages, that uncertainty was the result of Ohio's initial election to seek post-verdict equitable rather than legal relief. Certainly the Supreme Court in *Zenith* did not contemplate that a plaintiff

[11] What little authority there is on this question is split. *Compare Neeld v. National Hockey League*, 439 F.Supp. 446, 452 (W.D.N.Y. 1977) *with Poster Exchange, Inc. v. National Screen Service Corp.*, 456 F.2d 662, 667 (5th Cir. 1972); *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 369 F.Supp. 316, 326 (M.D.N.C. 1973), *rev'd on other grounds*, 527 F.2d 1162 (4th Cir. 1975). The Court believes that the policies underlying the *Zenith* speculativeness exception to accrual of causes of action in statute of limitations cases applies equally to issues of res judicata. However, in light of the Court's conclusion that Ohio's damages were not speculative at the time of trial in the 1971 case, it need not decide this issue, but rather may assume the applicability of this doctrine to the instant case.

by its own actions could create speculativeness, and then use that uncertainty as to future damages to avoid the policies underlying res judicata.

Ohio fares no better in its argument as to the unprovable nature of the post-verdict damages. As this Court has observed,

> . . . there is broad latitude in establishing damages in private antitrust actions. . . . While the amount of damages may not be calculated solely on the basis of mere speculation or guesswork, neither is it required that the damages be based on mathematical certainties. Rather, the finder of fact 'may make a just and reasonable estimate of the damage based on the relevant data presented at trial and render its decision accordingly.' *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 991 (7th Cir. 1976).

*Ohio-Sealy Mattress Manufacturing Co. v. Duncan*, 486 F.Supp. 1047, 1053 (N.D.Ill. 1980) ("Duncan"). Defendants have suggested two methods for calculating loss of future profits, both of which have been approved by various courts: projecting future profits on the basis of past profit performance, and discounting that figure to present value, *Shor-Line Rambler, Inc. v. American Motor Sales*, 543 F.2d 601, 605 (7th Cir. 1976), *Greene v. General Foods Corp.*, 517 F.2d 635, 663–666 (5th Cir.), *cert. denied*, 424 U.S. 942, 96 S.Ct. 1409, 47 L.Ed.2d 348 (1976); and determining the fair market value of a business. *See e.g. Landon v. Twentieth Century-Fox Film Corp.*, 384 F.Supp. 450, 458 (S.D.N.Y.1974). Although Ohio has argued that the fair market value approach is inaccurate in that it would fail to give it the benefit of its bargain, it has been silent as to the alternative approach suggested by defendants. And, indeed, the Court believes that the technique of projecting lost future profits could have been used by Ohio in the trial of the 1971 action. In a similar situation, the court in *Greene* approved the use of expert testimony which calculated future profits on the basis of "trends established in the years preceding the termination, giving more emphasis . . . to the more recent years." 517 F.2d at 664. The court explained that

such an estimate was likely to be fairly accurate since the plaintiff had been in business for 19 years and thus had an ample data base from which to work. *Id.* As this Court has observed, Ohio in the first trial adduced considerable evidence as to its lost past profits, using the technique of applying "a representative Ohio plant profit margin to the sales actually made by Sealy after acquisition." *Duncan*, 486 F.Supp. at 1053. Moreover, as in *Greene*, there was a wealth of comparative information from which Ohio could have drawn projections of future profits. Thus, the Court finds that this past profit data could have been used by Ohio in the 1971 case to make a reasonable estimate of future damages.

Ohio misconceives the meaning of *Zenith* when it asserts that the decision held this method of calculating future damages to be impermissible. *Zenith* did not alter the well-established body of law governing the question of speculativeness. Rather, it simply applied that body of law to statute of limitations questions. Indeed, this is borne out by the use of this method of calculation in *Shor-Line Rambler* and *Greene*, both decided after *Zenith*. Thus, the *Zenith* Court's rejection of the proposed method of calculating future profits therein turned upon the facts of that case. For that reason, *Zenith* is of aid to Ohio's position only if the facts of the 1971 action are sufficiently similar to those presented in *Zenith*. In *Zenith*, however, the plaintiff was seeking damages for its exclusion from entry into a particular market. To prove future damages, plaintiff not only would have had to show what its ultimate market share would have been, but also how long it would have taken it to achieve that market share and the lingering effects it would have suffered. In the 1971 case, however, Ohio had sought to enter a market by purchasing going concerns rather than by starting new enterprises. For this reason, the ultimate market share that Ohio would have had was known, as was the time it would have obtained that share absent the allegedly illegal acquisitions. Unlike *Zenith*, the Court does not believe that Ohio's future damage claims would have gotten "short shrift" had they

been pursued in the 1971 case. *See Zenith*, 401 U.S. at 342, 91 S.Ct. at 808. Thus, the Court concludes that Ohio's post-verdict damages at the time of trial in the 1971 case were not speculative within the meaning of *Zenith*.[12]

Finally, Ohio claims that the post-verdict damages sought herein were not part of the 1971 cause of action because they resulted from post-verdict "nonactions" by defendants. In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), the Supreme Court recognized that a prior judgment did not bar a subsequent action involving essentially the same course of conduct, since "[s]uch a course of conduct—for example, an abatable nuisance—may frequently give rise to more than a single cause of action." *Id.* at 327–328, 75 S.Ct. at 868. In *Lawlor*, however, the subsequent action did not arise merely out of defendant's failure to abate an abatable nuisance, but rather from overt acts occurring subsequent to the prior judgment. *Id.* at

[12] The Court observes that the magistrate reached the same conclusion. He found, however, that future damages were speculative in the sense that Ohio's future damages were infinite in amount, whereas the defendants' capacity to respond in damages was finite. To the extent this kind of "speculativeness" ever may be said to exist, it is not of the type contemplated by *Zenith*. Nor can the rules of res judicata be relaxed, as the magistrate implicitly suggested, because Ohio might have feared that the jury simply would not return a damage award of the magnitude that would have resulted from the inclusion of future damages. Indeed, even as a factual matter, this view of the jury process is of questionable validity, particularly in light of the recent damage award returned by the jury in *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 74 C 0633 (N.D.Ill.).

The Court also rejects Ohio's argument that summary judgment is precluded on this issue by virtue of the existence of disputed facts as to the speculativeness of future damages at the time of trial in the 1971 case. Inasmuch as the Court has the benefit of the record and theories in that action, an evidentiary hearing would not be of further assistance to the Court in deciding whether future damages were speculative. Indeed, in an analogous situation, the Supreme Court in *Zenith* decided the speculativeness issue itself rather than remand the case for a hearing and determination by the trial judge. 401 U.S. at 340, 91 S.Ct. at 807.

328, 75 S.Ct. at 868. That subsequent causes of action may arise only from acts, rather than the continued consequences of adjudicated past behavior, also is implicit in *Zenith*, which observed that antitrust causes of action accrue each time "a defendant *commits an act that injures* a plaintiff's business." 401 U.S. at 338, 91 S.Ct. at 806 (emphasis supplied).

And indeed, the weight of the authority requires post-verdict actions by a defendant, rather than adverse consequences stemming from inaction, in order to establish a cause of action. For example, in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), the court distinguished between continuing conduct by a defendant that caused damage and the "continuing damages it [plaintiff] feels from a single day's monopoly and refusal to deal . . ." *Id.* at 125. In the latter instance, the "actionable wrong is by its nature permanent at initiation without further acts." *Id.* at 126. Thus, once that wrong is litigated, a plaintiff is not entitled to maintain a subsequent action to remedy the "abatable but unabated inertial consequences" of that actionable wrong. *Id.* at 128. In the former situation, however, a subsequent action may be maintained, since the post-verdict action and damage give rise to a cause of action distinct from the one litigated earlier. *See also In re Multi-district Vehicle Air Pollution*, 591 F.2d 68, 71-72 (9th Cir. 1979); *Imperial Point Colonades Condominium v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977).[13] The Court considers defendants' acquisitions of

[13]Although these cases deal with statute of limitations issues, the Court believes the principles enunciated therein are applicable in this context as well. Ohio argues that *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313, 1318 (5th Cir. 1970), a case involving res judicata, applies a more lenient rule in determining new causes of action. Therein, the court held that significant actions or *nonactions* occurring subsequent to the filing of a related lawsuit may give rise to new causes of action for damages. However, in a subsequent appeal in that action, the court clarified its earlier opinion by stating that "we concluded that they [the pleadings] could be read to allege new claims based on *significant post-1961 actions* . . ." *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 110, 113 (5th Cir. 1975) (emphasis supplied).

the businesses in question, to the extent they were illegal, to be of the type of acts that are by their "nature permanent at initiation." Any damage suffered by Ohio was complete at the time of acquisition and, as the Court has held, capable of proof. Unlike the situation where there are continued refusals to deal, the acts causing the damage—the acquisitions—have not been repeated.[14] Thus, the Court must reject Ohio's argument that defendants' refusal to divest themselves of the acquired businesses and thereby abate the "inertial consequences" of those acquisitions constitutes a new cause of action.[15]

Thus, for the foregoing reasons, it is clear that Ohio's effort to seek post-verdict damages from Sealy is barred by res judicata. Whether the same doctrine bars Ohio from seeking those damages from the director-defendants is more problemmatic. The director-defendants were not parties to the 1971 action; and, in their answer to the complaint, they deny the existence of privity with Sealy. Without privity, of course, the director-defendants cannot invoke the doctrine of res judicata.

This point need not detain the Court, however, inasmuch as the principle of satisfaction of judgment provides an independent

[14]For this reason, the recent decision in *Borger v. Yamaha International Corp.*, 625 F.2d 390, 398 (2d Cir. 1980), is inapposite. There, the court found that future profits were too speculative to be considered by a jury in a refusal to deal case, since "it would be pure speculation for the jury to determine that Yamaha's refusal to grant Borger's a franchise was forever irrevocable. . . ." *Id.* at 75,898.

[15]Nor is there merit in Ohio's contention that defendants' alleged post-verdict conduct—such as requiring passover and warranty payments—permit it to seek future damages stemming from the pre-act acquisitions. It is clear that Ohio may sue only for those damages which occur as a result of some post-verdict act. The mere allegation that the post-verdict acts were but a continuation of the pre-verdict conspiracy is insufficient to entitle Ohio to damages in addition to those which is has received to remedy defendants' pre-verdict conduct. *Baker v. F & F Investment*, 420 F.2d 1191, 1200 (7th Cir.), *cert. denied, Universal Builder's Inc. v. Clark*, 400 U.S. 821, 91 S.Ct. 40, 27 L.Ed.2d 29 (1970).

basis for the director-defendants' motion.[16] Irrespective of privity, that doctrine provides that "where a plaintiff has obtained a judgment against one tortfeasor and that judgment has been satisfied, the plaintiff is barred from seeking recovery from another joint tortfeasor." *Hartsfield v. Seafarers International Union,* 427 F.Supp. 264, 267 (S.D.Ala.1977); *see also Sessions v. Johnson,* 5 Otto 347, 95 U.S. 347, 24 L.Ed. 596 (1877). Moreover, this rule obtains, regardless of whether plaintiff sought or received all damages that allegedly resulted from the wrong litigated in the earlier proceeding. *Hartsfield,* 427 F.Supp. at 268. As the court in *Hartsfield* observed, the underlying rationale of satisfaction of judgment is twofold. First, it seeks to prevent plaintiffs from receiving unjust enrichment by filing seriatim actions against individual tortfeasors and obtaining windfall recovery. Second, the doctrine is court-protective in that it prevents the drain on judicial time and resources that otherwise would result from such repeated litigation. *Id.* at 267.

There is no question but that Ohio has received full payment of the $10.2 million judgment it obtained in the 1971 action, as well as an additional $2.8 million in interest. The fact that there has not as yet been an attorneys' fee award made does not render the judgment unsatisfied. *See* Rule 32(b), General Rules for the Northern District of Illinois ("The clerk shall enter the satisfac-

[16]The director-defendants have argued that they may admit privity only for the purposes of this motion, while reserving the question as to the other aspects of the case. It is true that if these defendants would fail in their motion, any admissions made for the purposes of the motion would not be binding. Conversely, if defendants prevail on a motion based in part on an admission made therein, that admission is binding on them for the other issues in the case. Stahly, Inc. v. M. H. Jacobs, 183 F.2d 914, 919 (7th Cir.), *cert. denied,* 340 U.S. 896, 71 S.Ct. 239, 95 L.Ed. 650 (1950). At any rate, the director-defendants stated that they would concede the privity issue if the Court ruled against them on the satisfaction of judgment motion, and held that they would not admit privity solely for the purpose of the motion. Thus, res judicata provides an alternate basis for granting director-defendants' motion for partial summary judgment.

tion of a judgment upon payment to the court of the amount of the judgment plus interest and costs"); *cf. Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 561 (7th Cir. 1975) (attorneys' fee awards held to be incidental to the main litigation.)[17] Nor does the fact that Ohio accepted a remittitur, thereby halving its recovery, obviate the satisfaction of judgment. Whether or not the trial judge in the 1971 action erred in ordering a remittitur is irrelevant. As the Seventh Circuit recognized, Ohio, by accepting the remittitur rather than opting for a new trial and the opportunity to appeal therefrom, waived the right to challenge the adequacy of the remitted judgment. *Ohio-Sealy*, 585 F.2d at 840. By seeking additional recovery from the director-defendants, Ohio is attempting to attack indirectly that which it has waived the right to attack directly. This the Court will not permit Ohio to do.

Accordingly, the Court grants Sealy's motion for partial summary judgment on Counts I–IV and VI of the amended complaint, and the director-defendants' motion for partial summary judgment as to Counts I–IV. The effect of this ruling is that Ohio may not seek post-verdict damages for any acts that occurred prior to the verdict in the 1971 action.

## IV. *Ohio's Motion To Sever Count VI*

The magistrate recommended that this motion be granted, largely for the reason that the allegations and theories contained in Count VI were considerably different from those contained in the remainder of the complaint, and that severance would make for an easier and less confusing trial. Sealy did not oppose this motion, either in the proceedings before the magistrate or in the

[17] This is not to suggest—nor do the director-defendants so argue—that satisfaction of judgment bars Ohio from seeking an attorneys' fee award at the close of the equitable proceeding in the 1971 case. Rather, the Court merely finds that the absence of an attorneys' fee award to date does not bar application of the satisfaction of judgment doctrine to prohibit Ohio from seeking additional damages for pre-verdict conduct.

briefs filed with this Court. However, the Court observes that the need for severance is greatly diminished in light of the ruling today disposing of many of the allegations in Counts I and VI, as well as Counts II–IV in their entirety. Thus, severance of Count VI would appear to be unnecessary in view of the present posture of the case. Accordingly, the motion to sever Count VI will be denied without prejudice to a future motion by Sealy or Ohio should severance become appropriate.

V. *Michigan-Sealy's Motion To File A Cross-Claim Against Sealy, Inc.*

The magistrate recommended that this motion be granted, inasmuch as there would be no prejudice to defendants and it would be in the interest of judicial economy to have the cross-claim tried in the same case with Counts I and III of the Amended Complaint, whose theories it closely tracks. Once again, however, this conclusion must be reassessed in light of the Court's decision granting defendants' summary judgment on the acquisition claims set forth in these counts. In the present posture of the case, the cross-claim that Michigan-Sealy seeks to file would not promote judicial economy, but rather would complicate the trial of the 1976 case. Moreover, denial of Michigan-Sealy's motion to file a cross-claim would not prejudice that party's right to proceed in a separate action on the theories contained therein. Accordingly, Michigan-Sealy's motion to file a cross-claim is denied.

VI. *Ohio's Motion To Consolidate The 1976 and 1979 Cases*

By this motion, Ohio seeks to consolidate Counts I–IV of the 1976 case with certain elements of the 1979 case. The magistrate recommended that this motion be granted, with the qualification that the cases should be severed if the 1976 case would be ready for trial before the 1979 case. However, inasmuch as Counts I–IV of the Amended Complaint substantially have been disposed of by

today's opinion, consolidation now would be inappropriate.[18] Accordingly, the motion to consolidate is denied.[19] It is so ordered.

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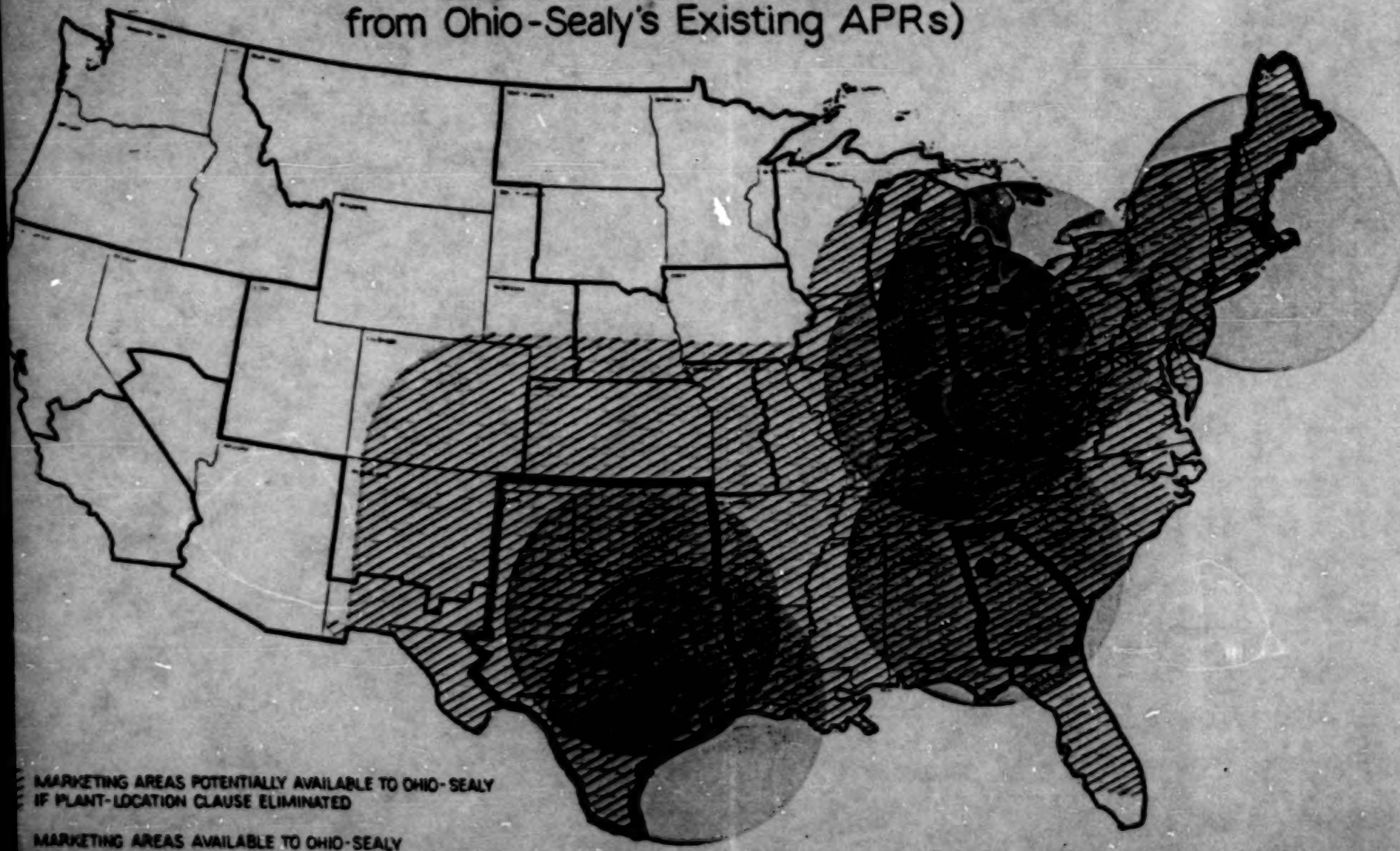
[18]In light of this decision, the Court also will deny Ohio's motion under Fed.R.Civ.P. 15 to amend the pleadings in the 1976 and 1979 actions by filing one consolidated complaint.

[19]In denying this motion, the Court nonetheless expects counsel in the 1976 and 1979 actions to follow through on their stated intention to cooperate on the discovery in the two actions, in order to satisfy the previously stated desire of all parties that both cases be brought to trial as expeditiously as possible.

# MARKETING AREAS POTENTIALLY AVAILABLE TO OHIO-SEALY IF PLANT-LOCATION CLAUSE ELIMINATED

(Based on 300-Mile Border
from Ohio-Sealy's Existing APRs)




DSX 408

## STATEMENTS PURSUANT TO RULES 21.1(b) AND 28.1

Petitioners Ohio-Sealy Mattress Manufacturing Company, Sealy Mattress Company of Houston, Sealy Mattress Company of Pureto Rico, Inc., Sealy of the Northeast, Inc., and Sealy Mattesss Company of Georgia, Inc., and respondents Sealy, Incorporated, Sealy Spring Corporation-Indiana, Sealy Spring Corporation-East, Sealy Spring Corporation-West, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Schnorr Manufacturing Company, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc., were parties to the proceedings in the Court of Appeals.

Petitioner Ohio-Sealy Mattress Manufacturing Company has no parent companies, subsidiaries other than wholly-owned subsidiaries, or affiliates. All of the other petitioners are wholly-owned subsidiaries of petitioner Ohio-Sealy Mattress Manufacturing Company.

Office - Supreme Court, U.S.
FILED
SEP 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-312

IN THE

# Supreme Court of the United States

October Term, 1982

OHIO-SEALY MATTRESS MFG. CO., ET AL.,

*Petitioners,*

*v.*

SEALY, INCORPORATED, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

OHIO-SEALY MATTRESS MFG. CO., ET AL.,

*Petitioners,*

v.

SEALY, INCORPORATED, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF OF RESPONDENTS IN OPPOSITION

### STATEMENT OF THE CASE

Petitioner seeks review of a decision of the court of appeals which affirmed a final decree of the district court granting equitable relief in a private antitrust suit brought by petitioner against respondent. The decision below is not in conflict with any decision of any other court of appeals or inconsistent with

any decision of this Court. No novel or substantial issue of law is raised by the petition and further review is not warranted.

**The Proceedings**

On a prior appeal (585 F.2d 821, A51 *et seq.*)[1] the court of appeals affirmed a money judgment in favor of petitioner and remanded the case to the district court for the sole purpose of reconsidering equitable relief. The money judgment that was affirmed resulted from a general verdict of a jury following a lengthy trial. The trial judge had found that the amount of the verdict was excessive because of prejudicial conduct of petitioner's counsel during the trial and had ordered a new trial or, in lieu thereof, a remittitur of 50% of the amount of the verdict. Petitioner accepted the remittitur. On respondent's appeal, the court of appeals held that the evidence was sufficient to support the jury's verdict. The court also rejected respondent's argument that the prejudice found by the trial judge could not be cured by remittitur; it ruled that the trial judge had erred in finding prejudicial misconduct. In so ruling, the court of appeals stated that the principle of *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) not only bars a plaintiff from appealing an accepted remittitur but "also forecloses [plaintiff] from seeking reinstatement of the 50% remitted now that [defendant] attacks the remittitur on appeal." 585 F.2d at 840, A86.

Respondent satisfied the affirmed judgment. On remand petitioner nevertheless moved the district court to reinstate the remitted portion of the jury's award. The motion was denied. Petitioner also made various motions to supplement its complaint and hold a jury trial on claims for post-verdict damages. (Petitioner previously had filed a separate action, which is still pending in the district court, for recovery of such post-verdict damages.) Those

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1. References are to the Appendix contained in the Petition For A Writ Of Certiorari.

motions were also denied. The district court then proceeded, in accordance with the mandate of the court of appeals, to determine appropriate equitable relief. Following an evidentiary hearing, the district court entered a broad injunctive decree, discussed more fully below. On petitioner's appeal, the court of appeals affirmed the district court's decree, as well as its refusal to reinstate the remitted portion of the verdict and its refusal to allow a supplemental complaint for additional damages. (669 F.2d 490, A1 *et seq.*) Petitioner seeks review of that decision.

**The Facts**

Respondent Sealy, Inc. owns a number of trademarks relating to mattresses and other bedding products. It licenses these trademarks to a number of independent manufacturers, located in different geographic areas, who manufacture and sell Sealy bedding pursuant to specifications issued by Sealy. Sealy also provides a variety of advertising and technical services to the licensees.[2] Sealy was formed many years ago by a number of small manufacturers in different parts of the country in order to establish a national brand that could be marketed in competition with those of integrated national firms.[3] Each original licensee, and others as added, received stock in Sealy and almost all of Sealy's stock is presently owned by licensees and their family members.[4]

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2. As a result of Sealy's acquisition of a number of former licensees, Sealy also has wholly-owned subsidiaries which manufacture bedding in various parts of the country.

3. The mattress-manufacturing market is highly fragmented. As of 1972 the 50 largest firms accounted for approximately 54% of the market. U.S. Bureau of the Census, Census of Manufacturers, 1972, Special Report: Concentration Ratios in Manufacturing, MC 721 (SR)-2. There are a number of licensing groups similar to Sealy.

4. Petitioner Ohio-Sealy was one of the founding licensee-stockholders and was for many years one of the principal stockholders. Since the beginning of this litigation in 1971 it has sold all of its Sealy stock to Sealy or other stockholders.

The original license agreements between Sealy, Inc. and its manufacturer-licensees assigned each licensee an exclusive territory for the manufacture and sale of Sealy products; Sealy promised not to license any other person to manufacture or sell in the designated area, and each licensee was forbidden to sell Sealy products outside its assigned area. In *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), A157 *et seq.*, it was held that these "mutually exclusive territories" were illegal per se. In reaching that conclusion the Court characterized the restrictions as "horizontal" because the licensee-stockholders constituted Sealy's board of directors and thus directly controlled the day-to-day business of the corporation. (350 U.S. at 352-54, A158-60.) Because Sealy had also engaged in retail price-fixing, the Court found that there was an "aggregate of restraints" which justified the conclusion of per se illegality. (350 U.S. at 357-58, A163.)

On remand, the government and Sealy worked out a remedial decree whereby Sealy was enjoined from restricting its licensees to sales within prescribed territories. On entry of the decree the government stated to the Court that it did not interpret the decree as prohibiting per se the use of manufacturing location clauses, areas of primary responsibility, or pass-over provisions. (*See* 585 F.2d at 826, A58.) Sealy then amended its license agreements by eliminating exclusive sales territories. The revised agreement designated areas of primary responsibility, licensed each licensee to manufacture at a specified location or locations within the area of primary responsibility, and promised not to license others to manufacture Sealy products within a licensee's area of primary responsibility. The licenses also provided for pass-over payments to be made on sales within another licensee's area of primary responsibility, measured by the home licensee's advertising and promotion expenses per unit of sale, as well as a small charge to cover potential warranty repairs that the home licensee might be called upon to make on such sales. These latter provisions were intended to prevent the outside licensee from obtaining a "free ride" on the home licensee's pre-sale and post-sale costs.

The present suit by petitioner, one of the licensees, attacked the revised license agreement. The suit charged that various provisions of the new license agreement (including those mentioned as well as a right-of-refusal clause allowing Sealy, Inc. to purchase the business of a selling licensee) constituted, in the aggregate, a market-allocation scheme that was illegal per se. The jury returned a verdict in favor of petitioner. In upholding the verdict on the first appeal, the court of appeals reasoned that the jury could have found that the restraints, in combination, had a purpose and effect that was illegal per se. The court noted, however, that the exclusive manufacturing areas alone did "little more than set the stage for the balance of the restraints attacked," that Ohio did not attack the exclusive manufacturing areas except in a limited way, and that the exclusive manufacturing areas standing alone were consistent with significant intrabrand competition. (585 F.2d at 828, A62.) In remanding for further consideration of equitable relief,[5] the court stated that "We do not mean to say by any means that the court must find any particular practice attacked by Ohio to violate the antitrust laws." (585 F.2d at 844, A95.)

Meanwhile, during the pendency of the first appeal Sealy had revised its corporate structure by eliminating any licensee representation on the board of directors and substituting a board composed of independent businessmen having no interest in or connection with any of the licensees. On remand the district court found that the present board consists of "men of stature and experience, capable of making independent economic and legal business decisions." (A151.)

The decree entered by the district court on remand went well beyond any relief that might reasonably be necessary to create

5. The district court had denied equitable relief. Its conclusion assumed that the general jury verdict, which encompassed a variety of antitrust charges in addition to the market-allocation claim, had not conclusively established any specific antitrust violation. The court of appeals held that this was error. 585 F.2d at 844, A95.

abundant potential for competition among Sealy licensees. (A153-55.) The decree (1) eliminated the plant-location clause, thus enabling licensees to locate manufacturing plants anywhere within their areas of primary responsibility; (2) eliminated pass-over payments, thus enabling licensees to "free-ride" on the home licensee's promotion efforts and expenditures; (3) eliminated the warranty-repair charge; (4) enjoined use of the right-of-first-refusal clause for any anticompetitive purpose; (5) eliminated a clause forbidding licensees to own interests in other major mattress brands;[6] and (6) placed certain restrictions on the clause dealing with transfer of licenses.[7]

The district court declined to enjoin or modify the provision which assures a licensee that Sealy will not license other persons to manufacture Sealy products within the licensee's area of primary responsibility. Petitioner did not request total elimination of the clause but only that it be modified to require Sealy to grant such licenses on some objective standard. Petitioner's own expert testified that an unlimited right of licensees to build plants in other licensees' areas could lead to excess capacity and be harmful to interbrand competition. (A133.) The expert was unable, however, to propose any more limited standard that the district court found workable. (A134-35.) The district court concluded that any relief that had the effect of giving a licensee the right to manufacture wherever it pleased would threaten the efficiency of the Sealy organization and its effectiveness as a competitor in the interbrand bedding market. The court also concluded that such relief would be tantamount to permitting a licensee to appropriate the trademark rights of Sealy. (A132-35.)

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6. The licensees had always been free to make and sell private-brand bedding without restriction.

7. Other provisions of the decree enjoined certain practices that had been challenged as tying violations. The court declined to order divestiture of three licensees that had been acquired by Sealy. Those aspects of the decree are not in issue here.

## REASONS FOR DENYING THE WRIT

The questions on which review is sought involve no conflict with any decision of this Court or of any other court of appeals. The decision below, which ends an eleven-year-old lawsuit,[8] is clearly correct; the issues have been fully considered in two opinions of the court of appeals; and further review is unwarranted.

### I. The Antitrust "Question" Posed By Petitioner Is Not Presented By The Record And The Decision Below Is Clearly In Accord With The Decisions Of This Court.

Far from presenting any antitrust issue "of unusual importance" (Pet. 4), the decision below raises no novel question whatever. It involves no substantive question of antitrust liability but only the shaping of appropriate relief in the circumstances peculiar to the facts of this case.

The framing of equitable relief in antitrust cases rests largely in the discretion of the district court. *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947). The district court granted extensive relief, framing a decree that the court said required "surgical skill." (A153.) The court of appeals found that the district court's discretion had been properly exercised and that the relief awarded was fully adequate to prevent any future antitrust violation that could properly have been found. The decision below is entirely consistent with the decisions of this Court and raises no issue of law calling for review by this Court.

1. The case does not present the question whether "horizontal allocation of exclusive manufacturing territories" is illegal, per se or otherwise. The "horizontal" characterization is merely

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8. Subject only to determination of attorney's fees, a matter presently before the district court.

argumentative, and begs the question. The court of appeals made no such characterization, and the facts neither require nor support it.

*United States v. Sealy, Inc.*, 388 U.S. 350 (1967) and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) are inapplicable. In *United States v. Sealy* the "horizontal" nature of the organization, and therefore of the restraints, was deemed to flow from the fact that the licensees were also actively in charge of the management of the trademark owner, as members of the board of directors and its executive committee. 388 U.S. at 353-54, A158-60.[9] The same was true in *United States v. Topco Associates*, 405 U.S. at 598-99, 609.

The Sealy organization no longer has the structure deemed decisive in those cases. It is not managed or directed by the licensees but by a board having no connection with the licensees. Sealy's evidence that the board is in fact independent was not challenged by petitioner at the hearing on equitable relief and the evidence stands uncontradicted. (A151.) This Court could not properly treat the present organization as "horizontal" without making its own findings of fact for which there is no record support.

As this Court's *Sylvania* opinion recognized, the classification of restraints as vertical or horizontal is not always automatic or self-evident. *See Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28 (1977); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979). That issue itself turns on issues of fact that cannot properly be determined by this Court in the first instance, and it would not assist in clarifying

9. Mr. Justice Harlan, dissenting, explained why the restraints could not properly be viewed as horizontal even under the corporate structure as it then existed. *See* 388 U.S. at 360-61, A165-67.

the antitrust laws for this Court to address, in the unique circumstances of this case, the question of the proper "classification" of the restraint in issue — or, as petitioner puts it, a question of antitrust "taxonomy" (Pet. 6).

The case obviously does not fall within the per se rule against price-fixing; the decisions cited by petitioner at page 6 of its petition are not in point.

2. The decision below, permitting respondent to retain its exclusive manufacturing territories, is not only consistent with this Court's decisions in *Sealy* and *Topco*, *supra*, but is directly supported by the Court's later *per curiam* decision in *United States v. Topco Associates, Inc.*, 414 U.S. 801 (1973) ("Topco II"), a decision ignored by petitioner.

The decision in *United States v. Sealy* was addressed to the "mutually exclusive" territories embodied in the former Sealy licenses — i.e. the exclusive sales territories, which prevented any intrabrand competition among the Sealy licensees. The decision was so understood by the government and by the district court, which entered a decree only forbidding provisions that restricted a licensee to "sales" within a prescribed territory. The *Sealy* decision was also so understood by this Court in the *Topco* case, which also invalidated exclusive *sales* territories. *See United States v. Topco Associates, Inc.*, 405 U.S. at 609.

Any question about the scope of those decisions was laid to rest by *Topco II*. On remand after the first *Topco* decision, the district court entered a decree expressly permitting location clauses, areas of primary responsibility, and pass-over payments. In support of such a decree the district court observed:

> [I]t is clear that a trademark owner must exercise some control over the licensee's use of the mark or it may become public property.... [I]t is essential that any member's license to use the various Topco trademarks be limited both as to time and space.... [N]obody interprets the Supreme Court's decision herein to

> require that, in the future, all members' franchises be unlimited both as to time and space. (1973-1 Trade Cases ¶ 74,485 at pp. 94,155-56 (N.D. Ill. 1973).)

The government appealed the decr[illegible] this Court, contending that it was inconsistent with the Court's decision. This Court affirmed. 414 U.S. 801.

The *Topco* decree and this Court's affirmance completely refute petitioner's apparent contention (Pet. 5) that all license restrictions, even as Sealy was previously constituted, are illegal per se. *A fortiori* there is no such per se rule applicable in the context of Sealy's present structure.

The decree entered by the district court in this case permits much greater latitude for intrabrand competition among licensees than did the *Topco* decree. Because mattresses can economically be shipped for substantial distances, any licensee can reach the markets at least of adjacent licensees and probably of others even more distant. Petitioner's own contention prior to the relief granted below was that the effective radius from a particular plant was only 300 miles. Even on that assumption (which was disputed by Sealy), elimination of the plant-location clause greatly extends the market area potentially available to a single licensee from plants within its assigned area of primary responsibility. *See, e.g.*, Exhibit 408, following A230. Elimination of the pass-over and warranty charges extends the potential range even more since the money saved by their elimination can be used to defray additional transportation costs.[10]

Under the circumstances, any contention that the designation of exclusive manufacturing areas creates an unreasonable restraint on intrabrand competition, let alone should be deemed a per se violation, is patently absurd.

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10. Ohio itself is presently making sales as far distant as California.

3. The recent decisions of this Court afford no basis for suggesting that the per se holdings in *United States v. Sealy* and *United States v. Topco* should be extended beyond their particular facts. Rather, the serious question — though of course not raised by the petition — is whether those decisions themselves can be reconciled with this Court's later rulings. *See Louis, Restraints Ancillary to Joint Ventures and Licensing Arrangements*: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music? 66 U. Va. L. Rev. 879 (1980). The decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) rejected the per se rule against price fixing in a "horizontal" context, recognizing that restraints in a joint-venture enterprise cannot be "wholly equated with a simple horizontal arrangement among competitors." *See* 441 U.S. at 23; *see also United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113-14 (1975).

Sealy, like ASCAP and BMI, is a joint venture formed to make possible a "product" that would not otherwise have existed: a national bedding brand enabling small independent manufacturers to compete with integrated national firms. In the light of the *BMI* decision, the restr tions in Sealy's licenses should properly be analyzed under the Rule of Reason as ancillary restraints that may be essential to the successful accomplishment of the main purpose of the enterprise, and thus within the rationale of the "vertical" restraints considered in *Continental TV v. GTE Sylvania. See* Brennan, J. (dissenting on other grounds), *United States v. Citizens & Southern National Bank*, 422 U.S. at 144-45; *United States v. Topco Associates, Inc.*, 319 F.Supp. 1031, 1038 (N.D. Ill. 1970); *see* Burger, C.J., dissenting, and Blackmun, J., concurring, in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 612-24.

4. Anticipating a possible reply brief, we respond to an additional argument made by petitioner in the court below — namely, that the challenged license provision must be treated as

"horizontal" (and therefore per se illegal) because of the fact that Sealy itself is a manufacturer, through subsidiaries, in some areas of the country, and thus is an actual or potential competitor of its licensees. This "dual-distributor" argument for per se illegality in connection with territorial restrictions has been uniformly rejected in numerous recent courts of appeals' decisions. *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354-57 (9th Cir. 1982) (refusing to apply per se rule to exclusive manufacturing territories of trademark licensor that also manufactured in territories reserved to itself); *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981); *Donald B. Rice Tire Co., Inc. v. Michelin Tire Corp.*, 483 F.Supp. 750 (D. Md. 1980), *aff'd*, 638 F.2d 15 (4th Cir. 1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir. 1980); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981). Although the opinion below did not expressly address this argument, the opinion's tacit rejection of the argument was clearly correct and raises no conflict among the circuits.

All of petitioner's arguments concerning the exclusive manufacturing clause were thoroughly canvassed in the court below, both on initial hearing and in supplemental briefs on petitioner's request for rehearing en banc, which was unanimously denied.

**II. The Settled Rule as to the Finality of an Accepted Remittitur Raises No Substantial Constitutional Question.**

The court below correctly rejected petitioner's attempt to repudiate its acceptance of a remittitur and of satisfaction of a judgment of $13 million based thereon. The court's decision was in accord with a settled line of decisions of this Court stretching back to 1889, most recently reaffirmed in *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977).

The doctrine was explained in *Lewis v. Wilson*, 151 U.S. 551, 554-55 (1894) in terms strikingly applicable here:

> This is a most extraordinary case. Nearly two years after a judgment has been formally entered, and after the plaintiff has received payment and acknowledged full satisfaction, he comes in and moves the court to enter a new judgment in double the amount....
>
> [T]here is nothing which prevents a party having a verdict from consenting to its reduction; and if he does so...he may not...repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that under the law the court had no power to disturb the verdict.... [W]hen advised that a new trial will be granted, unless he consents to a reduction of the verdict, he may, although knowing that the court has no power to grant such new trial, and that if it be done an appellate court will correct the error, consent to a reduction and let judgment be entered for the amount of the verdict thus reduced. And if he does so, he is concluded by his action in that respect.

In the present case the court of appeals permitted the plaintiff to assert error by the trial court for the limited purpose of sustaining the judgment plaintiff had obtained (585 F.2d at 840, A86-87; *cf. Durant v. Surety Homes Corp.*, 582 F.2d 1081, 1085 (7th Cir. 1978)) but correctly ruled that plaintiff could not thereafter seek reinstatement of the remitted portion of the verdict.

The long-settled rule as to the finality of an accepted remittitur clearly raises no substantial Seventh Amendment question. Just as a party may waive a jury trial in the first instance, so may a plaintiff waive a new trial in order to escape the risk of losing the judgment he has already obtained. In *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court rejected the device of *additur* as contrary to common-law practice at the time of adoption of the Constitution. At the same time, however, the Court distinguished, and declined to disturb, the doctrine of remittitur "first announced by

Mr. Justice Story in 1822 [and] accepted as the law for more than a hundred years and uniformly applied in the federal courts since that time." 293 U.S. at 484-85.

**III. Petitioner's "Rule 54(c)" Argument is Frivolous.**

With extraordinary temerity, petitioner asks the Court to grant certiorari to reverse a trial court's exercise of discretion, upheld by the court of appeals, in declining to allow a supplemental complaint for damages after an extended jury trial, after an appeal and a remand for the sole purpose of equitable relief, and where the plaintiff had already filed and was vigorously litigating a separate action seeking the very damages sought in the supplemental complaint.

The allowance of supplemental pleadings rests in the discretion of the trial court. Rule 15(d), Fed. R. Civ. P. Rule 54(c) does not repeal Rule 15(d). If a supplemental pleading is properly denied under Rule 15(d), the party has received "the relief to which [it] is entitled."

The trial court's denial of the supplemental complaint was obviously proper under the circumstances. Indeed, a different ruling would have been plainly contrary to the mandate of the court of appeals. In any event, petitioner can suffer no conceivable prejudice since it is presently actively pursuing the very same claims in a second action which it filed long before it presented the supplemental complaint in the instant action.

## CONCLUSION

The sole question before the district court in this case was the determination of appropriate equitable relief in this private antitrust action. The district court granted substantial relief. The question before the court of appeals, therefore, was only whether the district court had abused its discretion in shaping the decree, a function peculiarly vested in the district court. The court of appeals held that there was no abuse of discretion. Further review by this Court is not warranted.

Respondents respectfully submit that the writ of certiorari should be denied.

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## STATEMENT IN COMPLIANCE WITH RULES 22.2 AND 28.1

Respondent Sealy, Incorporated has no parent companies, affiliates or subsidiaries other than wholly-owned subsidiaries.

Sealy, Incorporated is the parent corporation of respondents SEALY SPRING CORPORATION-EAST (now known as Sealy Spring Corporation, a Delaware corporation), SEALY SPRING CORPORATION-INDIANA (now a division of Sealy Spring Corporation), SEALY SPRING CORPORATION-WEST (now a division of Sealy Spring Corporation), SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC. (now known as Sealy Mattress Company of Arizona, Inc.), SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., and SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.

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No. 82-312

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1982

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,
*Petitioners,*

v.

SEALY, INCORPORATED, et al.,
*Respondents.*

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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*Petitioners,*

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SEALY, INCORPORATED, et al.,

*Respondents.*

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondent Sealy's Brief in Opposition demonstrates the importance of not allowing the decision below to stand uncorrected. Respondent's Brief, by going far beyond the reasoning of the decision below, tacitly concedes that the decision cannot be justified within its four corners.[1]

Respondent's Brief in Opposition argues eloquently for review by this Court: if Respondent's arguments are correct, they should be adopted by this Court; if Respondent's arguments are incorrect, they should be rejected by this Court. In either event the legal ambiguities which have already produced 22 years of litigation would at long last be eliminated.

[1]Of the 22 cases cited by Respondent, only 4 were cited by the Court of Appeals; of the 13 cases cited by the Court of Appeals, only 4 are cited by Respondent. (Brief of Respondent In Opposition, ii-iii; Appendix to the Petition herein, A1-A12; *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir. 1982).

## I. The Court Should Resolve The Questions Left Open By *Sealy*, *Topco* and *Sylvania*

The question presented is not whether the district court had "discretion" in shaping equitable relief, because no court has discretion to condone a *per se* violation of Section 1 of the Sherman Act. 15 U.S.C. § 1 The question presented is whether Sealy's absolutely exclusive manufacturing territories constitute such a violation. The four arguments advanced by Respondent for denying the wr.. raise important questions of substantive antitrust law which merit resolution by this Court.

1. Respondent says that the characterization of Sealy's restraints as horizontal is "merely argumentative" (BRO 7-8),[2] but the district court found that they were "the products of a horizontal conspiracy (in this instance a conspiracy between Sealy and others of its licensees)." (A129)[3] Whether those restraints were subsequently sanitized—by Sealy's relatively recent election of a non-licensee board of directors—raises an important question under the antitrust laws: To what extent is the origin or source of the restraint determinative of its classification as vertical or horizontal? See *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See also item 4 below, where the "dual distributor" matter is addressed.

2. Sealy cites the Court's decisions in *Sealy* and *Topco* as reasons for denying the writ, but exactly the opposite is true. In *Sealy* the Court did not distinguish between Sealy's exclusive sales territories and its exclusive manufacturing territories, presumably because the former rendered the latter moot at the time. *United States* v. *Sealy Inc.*, 388 U.S. 350 (1967). The mattress business is a local business and no rational mattress company would want to manufacture mattresses in an area where it could not sell those mattresses. After the Court's *Sealy* decision, however, exclusive

[2] "BRO" references are to the Brief Of Respondents In Opposition.
[3] "A" references are to the Appendix to the Petition herein.

manufacturing territories became terribly important to Sealy, because a Sealy licensee which could manufacture Sealy mattresses wherever it wanted could also sell Sealy mattresses wherever it wanted. That is why Sealy's exclusive manufacturing territories were retained as a "means of getting around the Supreme Court ruling in such a way as to be able to retain the territorialization." Whether Sealy's exclusive manufacturing territories are unlawful *per se* is an important question which has never been answered by the Court.

Sealy's reliance on the Court's *Topco* decisions also supports granting the writ. In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) (*Topco I*), this Court held, in the strongest language possible, that a horizontal system which prohibited Topco licensees from having stores outside their respective territories constituted a *per se* violation of the Sherman Act. But Sealy licensees are still absolutely prohibited from establishing Sealy plants outside their respective territories, and if Ohio wants to sell Sealy mattresses in, say, California or Oregon, it must manufacture them in Texas. If the Court's decision in *United States* v. *Topco Associates, Inc.*, 414 U.S. 801 (1973) (*Topco II*) silently overruled *Topco I*, as Sealy argues (BRO 9 and 10), then the Court should grant the writ and make explicit that which Sealy claims was implicit in *Topco II*.

3. Sealy's third argument also supports granting the writ, because Sealy contends that there is a "serious question" (BRO 11) whether *Sealy* and *Topco I* can be reconciled with *Sylvania* and *Broadcast Music, Inc.*, v. *Columbia Broadcasting System, Inc.* 441 U.S. 1 (1979). This "serious question" has been the subject of numerous law review articles,[4] and this case presents an

[4]Altschuler, *Sylvania, Vertical Restraints, and Dual Distribution*, 25 Antitrust Bull. 1 (1980); Bondurant, *Legal Risks Posed By Sherman Act Section 1; Favoritism Of Owner Outlets And Strategic Pricing*, 48 ABA Antitrust L.J. 1815 (1979); and Stewart and Roberts, *Viability Of The Antitrust Per Se Illegality Rule; Schwinn Down, How Many To Go?*, 58 Wash. U.L.Q. 727 (1980).

"all-fours" vehicle for clarifying the *per se* doctrine in that important area of antitrust law.

4. Sealy's fourth argument—"dual distributor"—is actually a variation of Sealy's first argument, because it calls into question the standards to be applied in deciding whether a given restraint is vertical or horizontal. Sealy apparently contends that any restraint which contains a vertical element must be treated as vertical, even though it also contains substantial horizontal elements, and Sealy cites five decisions from four circuits in support of its contention. (BRO 12) Sealy does not, however, cite other decisions which reach a contrary conclusion,[3] and Sealy concedes that "the opinion below did not expressly address this agrument . . . ." (BRO 12) Sealy's argument should now be addressed by this Court, because it, like Sealy's other arguments, presents an important question under the antitrust laws which has not been, but should be, answered by the Court.

## II. The Court Should Resolve The Substantive Constitutional Question Which Has Never Been Addressed By The Court

The second clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U.S.C.A. Const. Amend. 7) The remittitur device can be reconciled with the Seventh Amendment only on the ground that it excises an "excrescence" from the jury's ver-

[3] *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973); Interphoto Corp. v. *Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969), *aff'g per curiam* 295 F.Supp. 711 (S.D.N.Y.); *Pitchford* v. *Pepi Inc.*, 531 F.2d 92 (3d Cir. 1976), *on remand*, 435 F.Supp. 685 (W.D. Pa. 1977).

dict. *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). In this case it has been established that the remitted $10.2 million was not an "excrescence." *Ohio Sealy, Inc.* v. *Sealy, Inc.*, 585 F.2d 821, 843 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979). It follows, therefore, that Ohio has been deprived of its right to trial by jury under the Seventh Amendment.

Sealy seeks to defeat the logic of the foregoing constitutional theorem by referring to "a settled line of decisions of this Court stretching back to 1889, most recently affirmed in *Donovan* v. *Penn Shipping Co. Inc.*, 429 U.S. 648 (1977)." (BRO 12) But *Donovan* did not address any substantive constitutional issue; it merely established a procedural rule that a plaintiff "may not appeal" (429 U.S. at 650) from a remittitur order without first enduring a second trial. In this case, however, Petitioner is not appealing from the remittitur order. Rather, Petitioner is appealing from the district court's refusal to exercise its power under Rule 54(b) to correct an established error and restore to the jury's verdict $10.2 million which was not an "excrescence."

Nor does *Lewis* v. *Wilson*, 151 U.S. 551 (1894) support Respondent's argument, because in that case the trial court required *both parties*, to accept the reduced judgment; if both parties had not done so, the "excessive" verdict would have stood in the trial court, subject only to being reversed on appeal. 151 U.S. at 551-552. In other words, the plaintiff in *Lewis* v. *Wilson*, by joining with the defendant and accepting the remittitur, truly escaped "the risk of losing the judgment he had already obtained." (BRO 13) In the instant case, however, Petitioner was exposed to that very risk until October, 1978, when the Court of Appeals held that the jury verdict had been "unnecessarily halved." *Ohio-Sealy, Inc.* v. *Sealy, Inc.*, 585 F.2d at 843.

*Dimick* v. *Schiedt, supra*, establishes that the Seventh Amendment has been violated in this case, and there is no practical or procedural reason why that violation should not be corrected. By

so acting the Court can enforce the will of the Founding Fathers and thus fulfill its oath to uph l the Constitution of the United States of America.

### III. The Court Should Make It Clear That Rule 54(c) Is Not Discretionary

The Court of Appeals did not even mention Rule 15(d), Fed. R. Civ. P., let alone base its decision on that Rule. Nevertheless Respondent Sealy argues that Petitioner's criticism of the decision below is **"Frivolous"** on the ground that Rule 15(d) gives the district court "discretion" to deny leave to file a supplemental pleading. (BRO 14)

In support of its gloss on the decision below, Respondent misquotes Rule 54(c), which provides as follows: "... *every final judgment shall grant* the relief to which the party in whose favor it is entered is entitled, *even if the party has not demanded such relief in his pleadings.*" The italicized words are those omitted, without ellipses, from Respondent Sealy's purported quotation. It is obvious from a reading of the actual language of Rule 54(c) that the district court's failure to grant complete relief cannot be justified as an exercise of discretion under Rule 15(d).

Sealy's "no conceivable prejudice" argument (BRO 14) is equally misleading, because the district court in the second action has already ruled that the damages which Ohio seeks are barred by the doctrine of *res judicata. Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11 (N.D. Ill. 1980) (A226)

The inadequacy of the decision below is demonstrated by Respondent Sealy's strained efforts to justify that decision on grounds which find no basis whatsoever in the decision itself.

## CONCLUSION

The important questions raised by the Petition for Certiorari and emphasized by Respondent Sealy's Brief in Opposition were not even addressed, let alone answered, in the decision below. Neither the parties, nor the courts, nor the public interest will be served if those important questions remain in limbo during additional years of costly litigation.

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